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AN
ABRIDGMENT
OF THE
LAW OF NISI PRIUS.
VOL. II.

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By WILLIAM SELWYN, JUN. Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

*Quilibet scriptor adeo anxie sit sollicitus, ut ad veritatem dicat, perinde ac si
totius operis fides uniuscujusque periodi fide niteretur.* PREF. 6 REP.

THIRD EDITION,
WITH CONSIDERABLE ADDITIONS.

LONDON:

Printed for W. CLARKE and SONS, Law-Booksellers,
Portugal Street, Lincoln's Inn; and J. Cooke, Dublin.

1812.

Davidson, Printer,
Old Beeswell Court, London.

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XV. *Of the Action of Trespass for Mesne Profits.*

I. *Of the Nature of the Action of Ejectment.*

AN ejectment is a possessory action (1), wherein the title to lands and tenements may be tried, and the possession recovered, in all cases where the party claiming title has a right of entry; whether such title be to an estate in fee, fee tail, for life, or for years. From this description it should seem, that in strictness, this action could be maintained for the recovery of that species of property only, whereon an entry can be made. But it will be found, that in a few instances, which will be more particularly mentioned hereafter, this action has been extended beyond these limits. After the disuse of real actions, questions of title to land were usually tried in actions of replevin or trespass *quare clausum fregit*; and this practice continued, until the method of trying titles by the action of *ejectio firmæ* was introduced (2). But in the *ejectio firmæ*, damages only could be recovered until some time between the 6th Rich. 2. and 7th. Edw. 4. about which time it appears, from the year book of 7 Edw. 4. fol. 6. that it had been resolved by the judges, that the term, as well as damages, might be recovered (3).

The action of ejectment now in use is formed on the plan

(1) This action is usually termed a mixed action; improperly as it should seem, for the language of the judgment is, "*quod querens recuperet terminum ac damna*," and the writ of execution is "*quod habere facias possessionem*." See *Matthew v. Hassel*, Cro. Eliz. 144. and *Harebottle v. Placock*, Cro. Jac. 21.

(2) In the conclusion of Alden's case, 43 Eliz. 5 Rep. 105. b. Sir E. Coke has remarked, that titles of land were *at that day* for the most part tried in actions of *ejectio firmæ*.

(3) I am not aware, however, of any judgment for the recovery of the term prior to that in *East. T. 14 H. 7. Rot. 303.* a copy of the record of which will be found in *Rastal's Entries*, fol. 252. b. 253. a. ed. 1670.

of the *ejectio firmæ*, in its improved state, after it had been decided that the term might be recovered. In the action of ejectment, as was before observed, not only the title to the lands in question may be tried, but the possession also may be recovered, which circumstance renders it the most eligible mode of proceeding; inasmuch as in trespass, although the right may be ascertained, damages alone can be recovered. In the action of ejectment, indeed, the damages which are given are merely nominal; but the law has provided another remedy for the injury sustained by the party claiming title, in being kept out of possession from the time when his title accrued, to the time of recovering possession in the ejectment, viz. by an action of trespass for mesne profits; for a further account of which, see post, sect. xv.

Of the Requisites to support an Ejectment.—In order to maintain ejectment, the party at whose suit it is brought, must have been in possession, or at least clothed with the right of possession, at the time of the actual or supposed ouster^a. Hence, this action is termed a possessory action. The party, who has the legal estate in the lands in question, must prevail: hence, a party who claims under an elegit^b, subsequent to a lease granted to a tenant in possession, cannot recover; although he give notice to the tenant, that he does not intend to disturb the possession, and only means to get into the receipt of the rents and profits of the estate.

In the case of *Lade v. Holford*, E. 3 Geo. 3. B. R. Bull. N. P. 110. Lord Mansfield C. J. declared, "that he and many of the judges had resolved never to suffer a plaintiff, in ejectment, to be non-suited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee; but that they would direct the jury to presume it surrendered." From this doctrine a conclusion has been drawn, which the case by no means warrants, viz. that a plaintiff in ejectment may recover on an equitable title. The true meaning of the resolution delivered by Lord Mansfield is, that where trustees ought to convey to the beneficial owner, it shall be left to the jury to presume that they have conveyed accordingly: or where the beneficial occupation of an estate by the possessor^c (under an equitable title) induces a probability, that there has been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be directed to presume a conveyance of the legal estate. An estate was devised to trustees in trust for

^a Keilw. 130. a.

^b *Doe d. Da Costa v. Wharton*, 9 T. R. 2.

^c Per Kenyon C. J. 7 T. R. 3. and 8 T. R. 122.

I. S. an infant, with directions to convey the same to him on his attaining twenty-one^d. In an action of ejectment, brought four years after I. S. attained twenty-one, it was holden, that a jury might be directed to presume a conveyance to I. S. in pursuance of the trust. In these cases, when a conveyance is presumed, there is an end of the legal estate created by the term. But where the facts of the case preclude such presumption; or, if it appear in a special verdict^e, or special case^f, that the legal estate is outstanding in another person, the party who is not clothed with the legal estate cannot prevail in a court of law (4).

The plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of that of the defendant^g. Possession gives the defendant a right against every person who cannot shew a good title^h. But a lessee will not be permitted to defend an ejectment against his own landlord, on a supposed defect in the title of the landlordⁱ.

In a case, however, where the lessor of the plaintiff holding an estate under a lease for 21 years^k, underlet the same to the defendant for a year, and the defendant held over after the expiration of the 21 years, after which the lessor of the plaintiff gave the defendant a regular notice to quit, which not being complied with, an ejectment was brought; it was holden, that it was competent to the defendant to shew, that the lessor's title had expired, and that he had no right to turn him out of possession.

II. *By whom an Ejectment may be brought.*

An ejectment may be brought by the following persons:

1. Assignee of a bankrupt, 1 Wils. 276.

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| d England d. Syburn v. Slade, 4 T. R. 682. | h Per Lord Mansfield C. J. 4 Burr. 2487. |
| e Goodtitle d. Jones v. Jones, 7 T. R. 49. | i See Driver d. Oxendon v. Lawrence, 2 Bl. R. 1259. |
| f Roe d. Reade v. Reade, 8 T. R. 122. | k England d. Syburn v. Slade, 4 T. R. 682. |
| g Per Lee C. J. delivering the opinion of the court in Martin v. Strachan, 5 T. R. 110. a. | |

(4) "As to the doctrine, that the legal estate cannot be set up at law by a trustee against his *cestui que* trust, that has been long repudiated." Per Ellenborough C. J. in Doe d. Shewen v. Wroot, E. 44 G. 3. B. R. 5 East, 138. See further on this point *Lessee of Massey v. Touchstone*, reported in a note to *Shannon v. Brudstreet*, Irish Ch. Ca. Temp. Ld. Redesdale, vol. 1. p. 67.

2. Conusee of a statute merchant or staple.
3. Copyholder (5); Moor, 569. 1 Leon. 4. Cro. Eliz. 535. 4 Rep. 26. a. Cro. Jac. 31. Yelv. 144. 1 T. R. 600.
4. Corporation aggregate, Carth. 390. 12 Mod. 113. or sole.
5. Devisee, 1 Inst. 240. b.
6. Grantee of rent-charge, with a power to retain until satisfaction, 1 Saund. 112.

(5) If a copyholder, without licence, makes a lease for one year, or, with licence, makes a lease for many years, and the lessee be ejected, he shall not sue in the lord's court by plaint, but shall have an *ejectio firmæ* at the common law; because he has not a customary estate by copy, but a warrantable estate by the rules of the common law, Co. Cop. s. 51.

If the copyholders of a manor belonging to a bishopric, during the vacancy of the see, commit a forfeiture by cutting timber, the succeeding bishop may bring ejectment. *Read v. Allen*, Oxford circuit, 1730, per Comyns, Bull. N. P. 107.

An heir, to whom a copyhold descends, may surrender before admittance, because he is in by course of law, and the custom, which makes him heir to the estate, casts the possession upon him from his ancestor; consequently such heir may maintain ejectment before admittance*. But a stranger, to whom a copyhold is surrendered, has nothing before admittance, because he is a purchaser. Until the admittance of surrenderee the copyhold remains in the surrenderor, and if he die, his heir may bring ejectment. *Wilson v. Weddell*, Yelv. 144. But after admittance, surrenderee may maintain ejectment against surrenderor, and lay his demise on a day between the times of surrender and admittance. *Holdfast v. Clapham*, 1 T. R. 600. Admittance of tenant for life is admittance of him in remainder, without any other admittance. *Auncelme v. Auncelme*, Cro. Jac. 31. *Warsopp v. Abell*, 5 Mod. 307.

The devisee of a copyhold or customary estate, which had been surrendered to the use of the will, having died before admittance, it was holden, that her devisee, though afterwards admitted, could not recover in ejectment; for the admittance of the second devisee had no relation to the last legal surrender, and the legal title remained in the heir of the surrenderor. *Doe d. Vernon v. Vernon*, 7 East, 8.

Copyholds are not within the statute against fraudulent conveyances, and, therefore, if the plaintiff claim under a voluntary conveyance, though the defendant claim under a subsequent purchase for a valuable consideration, yet the plaintiff shall recover. Per *Blencowe J. Launceston ass.* 1699. Bull. N. P. 108.

* Adm. Per Cur. in *Roe d. Jeffereys v. Hicks*, 3 Wils. 15. and per Kenyon C. J. in *Doe v. Hellier*, 3 T. R. 169. S. P.

7. Guardian in socage (6).

8. Infant, per Mallet J. March, 143.

9. Legatee of a chattel real may maintain ejectment against executor¹ or a stranger^m; but the assent of the executor to the bequest must be proved.

10. Mortgagee, Doug. 21. Salk. 245. Str. 413 (7).

1 Doe v. Guy, 3 East, 120.

m 1 Str. 70.

(6) Guardian in socage may make a lease for years, and his lessee may have an *ejectione firmæ*, per three justices, Cro. Jac. 99. Adm. Hutt. 16, 17. Guardian in socage may make a lease of the infant's estate until his age of 14 years, and upon such lease the lessee may maintain an ejectment. 2 Rol. Abr. 41. (Q) pl. 4. Guardian in socage may bring trespass or ejectment in his own name, or make a lease of the land in his own name, until the infant arrive at the age of 14. Per cur. Ld. Raym. 131. Guardian appointed by deed, or will in writing, attested by two witnesses under the stat. 12 Car. 2. c. 24. s. 8 and 9, has the same interest in all respects as a guardian in socage had before, with these exceptions: 1st. such guardian may hold his office for a longer time than the guardian in socage could; viz. until the heir attain the age of 21; 2d. the next of kin not inheritable were the persons entitled to be guardians in socage; but, under the statute, the person appointed by the father shall be guardian. See Vaugh. 179. and 1 P. Wms. 102. See also several learned notes on the subject of guardianship in Hargr. Co. Litt. 88. b.

(7) But by stat. 7 G. 2. c. 20. s. 1. "Where any action of ejectment shall be brought by any mortgagees, their heirs, executors, &c. and no suit shall be depending in equity for foreclosing or redeeming such mortgaged lands; if the person having right to redeem, and who shall appear and become defendant, shall, pending such action, pay unto the mortgagees, or, in case of refusal, bring into court principal, interest, and costs, expended, either in law, or in equity, upon such mortgage; the monies so paid or brought into court, shall be in satisfaction of such mortgage, and the court shall discharge the mortgagor or defendant from the same, and compel the mortgagees by rule of court, at the costs of the mortgagor, to reconvey the mortgaged lands, and deliver up all deeds and writings in their custody relating to the title." N. There must be an affidavit, that there is not any suit in equity depending. After judgment for the plaintiff in ejectment, the mortgagor prayed to bring the money into court on the preceding statute; but, per Page and Chapple Js., the statute gives liberty to do it, pending the action: but, after judgment, the action is not depending: the application, therefore, was refused. Wilkinson d. Lock v. Traxton, B. R. M. 14 G. 2. Serjeant Leeds' MSS. This statute contains a proviso (s. 3.), that

11. Personal representative, stat. 4. Edw. 3. c. 7. 4 Rep. 94. a. 1 Vent. 30.
12. Tenant by elegit.
13. Tenant in common may maintain ejectment against his companion upon an actual ouster, Litt. sect. 322.
- N. Committee of a lunatic's estate cannot bring an ejectment, Hob. 215. Hutt. 16.

III. *For what Things an Ejectment will lie.*

In general, an ejectment will lie to recover the possession of any thing whereon an entry can be made, and whereof the sheriff can deliver possession. Hence an ejectment will lie for the recovery of

—— acres of alder carr in Norfolk, because alder carr is a term well known in that county, and signifies the same as alnetum, Barnes v. Peterson, Str. 1063.

Beastgate in Suffolk, Bennington v. Goodtitle, Str. 1084.

Bedchamber, 3 Leon. 210.

—— acres of bogge in Ireland, Cro. Car. 512.

Cattlegate in Yorkshire (8), Metcalf v. Roe, B. R. M. 9 Geo. 2. Ca. Temp. Hardw. 167.

Church, by the name of a messuage, Salk. 256.

Coalhill, Commyn v. Kyncto, Cro. Jac. 130.

it shall not extend to any case, where the party praying a redemption has not a right to redeem, &c. Hence where the mortgagor has agreed to convey the equity of redemption to the mortgagee, the court will not stay proceedings. Goodtitle d. Taysum v. Pope, 7 T. R. 185.

(8) Ejectment for 10 acres of pasture and cattlegates, with their appurtenances, in a close, called, &c. in Yorkshire. Motion after verdict in arrest of judgment, on the ground of uncertainty of description. Per Cur. Either cattlegate must be considered as pasture, and then it is synonymous with the word pasture preceding it; or else it must be taken for common of pasture for cattle; and then being after verdict, it must be taken for common appurtenant, which is recoverable in ejectment. Metcalf v. Roe, M. 9 G. 2. B. R.

——— *de mineris carbonum* in county palatine of Durham, Carth. 277.

Common of pasture, adjudged good after verdict; for it shall be intended such common of pasture as an ejectment will lie for, viz. common appendant or appurtenant, Newman v. Holdmyfast, Str. 54.

Cottage, Hill v. Giles, Cro. Eliz. 818.

——— acres of furze and heath, and ——— acres of moor and marsh, Connor v. West, 5 Burr. 2673.

House, Royston v. Eccleston, Cro. Jac. 54.

——— part of a house, known by the name of the Three Kings in A., Sullivan v. Seagrave, Str. 695.

Land, and coalpit in the same land. Objection, that it is *bis petitum*. Answer, *ejectio firmæ* is a personal action, and plaintiff demands nothing certainly, Harebotle v. Placock, Cro. Jac. 21.

N. Under the description of land, the owner of the soil may recover land which is subject to a public easement, such as the king's highway: and a wall being built on the land, shall not vitiate the description, Goodtitle d. Chester v. Alker, 1 Burr. 133.

Messuage or tenement called the Black Swan, 1 Sidf. 295.

——— acres of mountain in Ireland, Lord Kildare v. Fisher, Str. 71. Lord Kingston v. Babbington, 1 Bro. P.C. 71. Tomlins' ed.

Orchard, Wright v. Wheatley, Cro. Eliz. 854.

Rectory of B. and a certain place there called the Vestry, 3 Lev. 96, 97. Hutchinson v. Puller, adjudged on error in the exchequer chamber, and recognised in 2 Lord Raym. 1471.

Stable, 1 Lev. 58.

By virtue of the stat. 32 H. 8. c. 7. s. 7. an ejectment will lie for tithes, Priest v. Wood, Cro. Car. 301.

There is a case in 2 Ld. Raym. 789. Camell v. Clavering, *ex relatione magistri Cheshyre*, where it is reported to have been holden, in the Court of Exchequer, that an ejectment would lie for small tithes.

Where an Ejectment will not lie.—But an ejectment cannot be maintained for a

Close, 11 Rep. 55. Godb. 53.

Manor, without describing the quantity and nature of land therein, Latch 61. Lit. Rep. 301. Hetl. 146.

Message and tenement, Doe v. Plowman, 1 East's R. 441.
 (9) *Message garden and tenement*, Goodtitle v. Walton, Str. 834.

Message or tenement, Goodright on d. Welch v. Flood, 3 Wils. 23.

Message, situate in Coventry^a, in the parishes of *A. and B. or one of them*. Holden bad for uncertainty, after verdict, and that the words, "or one of them," could not be rejected.

De peciâ terræ, Moor, 702. pl. 976.

De castro, villâ et terris, Yelv. 118.

Ejectment will not lie for things that lie merely in grant, which are not in their nature capable of being delivered in execution, as an advowson, common in gross, Cro. Jac. 146.

An ejectment will not lie for a piscary, Cro. Jac. 146, Cro. Car. 492. 8 Mod. 277. 1 Brownl. 142. contra per Ashurst J. 1 T. R. 361.

Nor pro quodam rivulo sive aquæ cursu, called D. Yelv, 143. nor for Pannage, 1 Lev. 212.

IV. *In what Cases an Entry must be made on the Land before Ejectment brought.*

In some cases before an ejectment can be brought, some previous steps must be taken, in order to entitle the plaintiff to the action; as an entry must be made on the lands in question, or notice to quit must be given, &c. Under what circumstances these proceedings will be necessary, will appear from the following remarks:

An actual entry is necessary, to avoid a fine levied with proclamations, according to the stat. 4 H. 7. c. 24.; and an ejectment cannot be brought until such entry has been made^b. And by stat. 4 Ann. c. 16. s. 16. the action must

^a Goodright d. Griffin, v. Fawson, 7 ^b Berrington v. Parkhurst, Str. 1086.
 Mod. 457. 8vo. edit. 1 Barn. 150. Compere v. Hicks, 7 T. R. 727.
 -S. C.

(9) But *after verdict* the court will give leave (even pending a rule to arrest the judgment on this ground) to enter the verdict according to the judge's notes for the message only. Goodtitle d. Wright v. Otway, 8 East, 357.

be commenced within one year next after the making such entry, and prosecuted with effect.

N. The plaintiff must lay his demise on a day subsequent to the day of the entry^p.

But an actual entry is not necessary to avoid a fine at common law, without proclamations^q; nor a fine, with proclamations, if all the proclamations were not made at the time when the ejectment was brought^r; nor to maintain an ejectment on a clause of re-entry for non-payment of rent^s (10).

Where tenant for life levies a fine with proclamations, although it is not any bar to those in remainder, yet a remainder man must make an actual entry, in order to avoid it, before he can maintain ejectment^t.

An entry upon an estate generally, is an entry for the whole^u; if it be for less, it should be so defined at the time.

In a case, where a party had a right of entry upon condition broken^v, and a stranger entered, and afterwards the plaintiff assented to such entry, and brought an ejectment laying the demise after the assent, it was holden sufficient.

Where an ejectment is brought by a corporation aggregate, they must execute a letter of attorney to some person, empowering him to enter on the land; but a verbal notice to quit given by the steward of a corporation is sufficient^w.

Where lands are in the possession of a receiver^x, under an appointment of the Court of Chancery, an ejectment cannot be brought for the recovery of such lands, without leave of the court.

p 2 Str. 1086. 7 T. R. 727.

q Jenkins on d. Harris and Wife v. Prichard, 9 Wils. 45.

r Doe d. Duckett and Ladbroke v. Watta, 9 East, 17. in which Tapner d. Peckham v. Merlott, Willes, 177. was overruled.

s Goodright v. Castor, Doug. 477.

t Compère v. Hicks, 7 T. R. 433. 727.

u Per Lord Kenyon C. J. 3 T. R. 170.

v Fitchet v. Adams, Str. 1129.

w Roe d. Dean and Ch. of Rochester v. Pierce, 2 Camp. N. P. C. 96.

x Angel v. Smith, L. I. H. Feb. 1804. Eldon C. 10 Ves. jun. 335.

(10) "To avoid a fine [i. e. a fine with proclamations, where all the proclamations have been made at the time when the ejectment is brought] there must be an actual entry. In all other cases, the confession of lease, entry, and ouster, is sufficient." Per Lord Mansfield C. J. in Oates d. Wigfall v. Brydon, 3 Burr. 1897.

*V. In what Cases a Notice to quit must be given before
Ejectment brought.—Requisites of Notice.—
Waver of Notice.—Where Notice is not required.*

THE old tenancy at will being attended with many inconveniences, the inclination of the courts has of late been against the construing demises, where there is not any certain term mentioned, to be tenancies at will; and it has been considered as more advantageous to the parties, that such demises should be construed to be tenancies from year to year, so long as it shall please both parties; in which case one party cannot determine the tenancy, without giving a reasonable notice to quit to the other; with respect to which it may be laid down as a general rule, that half a year's (11) notice^a, expiring with the year of the tenancy, is a reasonable notice in all cases, except where a different period is established, either by express agreement or the custom^b of particular places (12).

If the tenant die, his personal representative, having the same interest in the land which the tenant had, will be entitled to the same notice; that is, half a year's notice ending with the year^c. So if an infant becomes entitled to the reversion of lands leased to a tenant from year to year, he cannot maintain an ejectment, unless he has given the tenant a proper notice to quit^d.

There is not any distinction between houses and land, in this respect. Half a year's notice to quit, ending with the

^a 12 H. 8. 15. b.

^b Roe d. Brown v. Wilkinson, Harg.

& But. Co. Litt. 270 b. n. 1. Roe d.

Henderson v. Charnock, Peake's N.

P. C. 4, 5.

^c Doe d. Shore v. Porter, 3 T. R. 13.

See also 3 Wils. 25. and Lawrence

J. in R. v. Stone, 6 T. R. 398.

^d Maddou v. White, 2 T. R. 159.

(11) By legal computation half a year contains 182 days; for the odd hours are rejected. 1 Inst. 135. b. But a notice served on the 28th of September to quit on the 25th of March, although the period contain only 179 days, has been holden to be a good notice. Doe d. Harrop v. Green, 4 Esp. N. P. C. 199. And Lord Ellenborough in the same case said, that a notice on the 29th of September to quit at Lady-day following had been holden good.

(12) By the custom of London, a tenant at will, under 40s. rent, shall not be turned out without a quarter's warning. Dethik v. Saunders, 2 Sidf. 20. See also Tyley v. Seed, Skin. 649.

year of the tenancy, must be given in both cases*. Neither will the circumstance of the rent being reserved quarterly vary the case, if the tenancy be from year to year^f (13). So if an house be let *from year to year*, to quit at a quarter's notice, the notice must be given to quit at the end of a quarter expiring with a year of the tenancy*. But if the demise be for one year only, and then to continue tenant afterwards, and to quit at a quarter's notice, a quarter's notice ending at any time will be sufficient^h.

A demise, "not for one year only, but from year to year," inures as a demise for two years at least; and, consequently, the tenant cannot be ejected after a notice to quit at the expiration of the first yearⁱ.

But where furnished apartments were taken^k "*for 12 months certain, and six months notice afterwards*," it was contended, that the defendant, under the above taking, was not at liberty to quit till six months' notice had been given after the expiration of the first year; but Lord Ellenborough was clearly of opinion, that the defendant was only bound to remain the 12 months certain, and that he was at liberty to quit at the end of that period, by giving six months' previous notice. His lordship laid considerable stress upon the word *certain*, applied to the first twelve months, which shewed that every thing afterwards was *uncertain*, and depended on the notice.

If a lessee, after the expiration of the lease, holds over and pays rent, the law presumes an agreement between the parties, that the tenant shall continue the possession according to the terms of the original demise, as far as those terms are consistent with a tenancy from year to year; in which case, if the landlord means to determine the tenancy, he must give the tenant half a years' notice to quit, corresponding with the time of the original taking. In this case the tenancy from year to year commences at the same time when the lease began^l; and if the tenant assign the premises, the assignee will be tenant from year to year from

c Right v. Darby, 1 T. R. 162.

i Denu v. Cartwright, 4 East, 31.

f Shirley v. Newman, 1 Esp. N. P. C. 267. Kenyon C. J.

k Thompson v. Maberly, 2 Camp. N. P. C. 573.

g Doe d. Pitcher v. Donovan, 2 Camp. N. P. C. 78. 1 Taunt. 535. S. C.

l Doe d. Castleton, v. Samuel, 5 Esp. N. P. C. 173.

h Per Chambre J. S. C.

(13) But where a house is taken by the month, a month's notice will be sufficient. Doe d. Parry v. Hazell, 1 Esp. N. P. C. 94.

the same time, and notice to quit must be given accordingly: e. g. if the original term began from Michaelmas, the notice must be to quit at Michaelmas.

The receipt of rent is evidence to be left to a jury that a tenancy was subsisting during the period for which that rent was paid; and if no other tenancy appear, the presumption is, that that tenancy was from year to year.

A., being tenant for life^m, with remainder to the lessor of the plaintiff in fee, on 22d June, 1785, demised to defendant for twenty-one years, to commence from old Lady Day then past. On 30th September, 1785, A. died; defendant continued in possession, and paid rent to the lessor of the plaintiff for two years, on old Lady Day and old Michaelmas Day; before old Michaelmas Day, 1787, lessor of plaintiff gave defendant notice to quit on old Lady Day then next. Adjudged, *per cur.*, that the notice was good, on the ground, that payment of rent on the 5th of April was evidence of an agreement for a tenancy from year to year to hold from that day; although it was objected, that the interest of the tenant for life having expired on the 30th of September, the notice ought to have been to quit at the end of the year from that time.

In January, 1790, A.ⁿ let a farm to defendant for *seven years by parol*. Defendant was to enter at old Lady Day on the land, and on the house on the 25th of May, and he was to quit at Candlemas. On the 22d of September, 1792, a notice to quit at Lady Day next was served on defendant. The court held, that this notice was improper, Lord Kenyon C. J. observing, that though the agreement be void by the statute of frauds, as to the duration of the lease, yet it must regulate the terms, on which the tenancy subsisted, in other respects, i. e. as to the rent, the time of year when the tenant was to quit, &c. The agreement was, that defendant should quit at Candlemas. If the lessor, therefore, chose to determine the tenancy before the expiration of the seven years, he could put an end to it at Candlemas only.

Where the in-coming tenant enters upon different parts of the demised premises^o, at different times, half a year's notice to quit, with reference to the substantial time of entry, that is, with reference to the original time of entry on the substantial part of the premises demised (14) is sufficient, the whole being demised at one entire rent.

^m Doe d. Jordan v. Ward, 1 H. Bl. 97. ^o Doe v. Spence, 6 East, 120. Doe v. n. Doe d. Rigge v. Bell, 5 T. R. 471. Watkins, 7 East, 551.

(14) It is not necessary, that the notice to quit should be given

Ejectment. On the 5th of October, 1769, plaintiff agreed to let to defendant a farm, to hold the arable land from the 13th of February then next, the pasture from the 5th of April; and the meadow from the 12th of May, for seven years, at a yearly rent; payable at Michaelmas and Lady Day, the first payment to be made at Michaelmas then next; and the defendant to have a way-going crop of three parts of the arable land after the expiration of the term, paying so much per acre. On the 30th of September, 1777, the plaintiff gave the defendant notice to quit the arable land on the 13th of February next, the pasture on the 5th of April, and the meadow on the 12th of May; a question arose, whether this notice was sufficient to entitle the plaintiff to recover the whole or any part of the premises, the defendants counsel having objected, that the notice to quit ought to have been given on the 13th of August, viz. half a year previously to the 13th of February, from which time the arable ground was holden; it was resolved by three justices (absente de Grey C. J.) that the notice to quit was sufficient; that the true construction of the agreement was, that it was a holding from Lady Day to Lady Day, the rent being payable at Michaelmas and Lady Day; and though part of the farm was to be entered on and quitted at old Candlemas, and the other not until old May Day, yet the custom of most countries would have directed the same in a taking from old Lady Day: that in the present case, any inconvenience, which the tenant might suffer, was obviated by that part of the agreement, which provided for his having a way-going crop.

The rule of construction laid down in the preceding case of *Doe v. Snowdon*, was recognised and adopted in *Doe v. Spence*, 6 East, 120., where, under an agreement by a tenant of a farm, to enter on the tillage land at Candlemas, and on the house and other premises at Lady Day following; and that, when he left the farm, he should quit the same according to the times of entry as aforesaid, and the

p *Doe d. Dagget v. Snowdon*, 2 Bl. R. q Recognised in *Doe v. Watkins*, 7 East, 551.

with reference to the time of entry on the other parts, which are only auxiliary to the principal subject of the demise. Neither is it necessary, that separate notices to quit the other parts should be given, where all the parts are demised as one entire thing. One notice, given in conformity with the rule laid down in the text, is sufficient.

rent, which was an entire rent for all the premises demised, was reserved half yearly at Michaelmas and Lady Day; it was holden, that a notice to quit, delivered half a year before Lady Day, but less than half a year before Candlemas, was good.

In ejectment for the recovery of messuages and lands, &c. on a demise laid the 11th of June, 1805, it appeared, that the premises in question, in possession of the defendants, consisting of dwelling houses, out-houses, mills, and other manufacturing buildings, and a few acres of meadow and pasture land, and bleaching grounds, together with all water-courses, &c., were holden under a written agreement for a lease, dated the 1st of January, 1792, for a term of thirty-five years, to commence, as to the meadow ground, from the 25th of December then last past; as to the pasture ground from the 52th of March next; and as to the housing, mills, and rest of the premises, from the 1st of May next; under one entire rent, viz. a yearly rent payable at Pentecost and Martinmas, the first payment to be made at Pentecost then next. A notice to quit was served on the defendants, on the 28th of September, 1804, to quit at the expiration of the then current year of their holding. It was objected that the notice was insufficient, on the ground that the substantial time of entry was either the 25th of December, whence the first holding, as to the meadow ground, was to commence; or from Martinmas preceding, the rent being reserved at Pentecost, and Martinmas, and the first half year being payable at Pentecost. But the court overruled the objection, and held the notice to be sufficient; Grose J. observing, that it was right to adhere to the rule laid down in *Doe v. Spence*, which was founded in good sense and convenience, *that the half year's notice to quit should be given with reference to the substantial time of entry of the tenant*, and when that was, must depend on what was the substantial part of the thing demised, whereon the tenant enters. In the present case, the substantial part of the demise was the house and manufacturing buildings, &c. on which the tenant was to enter on the 1st of May; that, therefore, was the substantial day of entry. Le Blanc J. added, that the substantial time of entry was not necessarily to be collected from the rent days, though it happened in the case of *Doe v. Spence*, that the tenant entered on the substantial part of the premises on the day from which the rent was reckoned.

It is a question of fact for the jury to decide, which is the principal and which the accessorial subject of demise.—This

r *Doe v. Watkins and another*, 7 East, 551. s *Doe on d. of Heapy v. Howard*, 11 East, 498.

being found, the judge may then determine, whether the notice to quit has been given in due time.

Requisites of Notice.—With respect to the notice to quit, it may be observed, that although a parol notice is sufficient, yet it is more advisable to give a written notice. The terms in which the notice is expressed should be clear and definite, in order to avoid any objection on this ground at the trial of the ejectment; for it has been holden^a, that where an irregular notice is given, it is not incumbent on the party served with it, to make an objection to it at the time of service; it is sufficient if he object to it at the trial. The courts, however, seem to listen to these objections with reluctance, and will, if possible, so construe the notice as to give effect to it. Hence, “I desire you to quit, &c. or I shall insist on double rent;” has been holden a good notice^a. So upon a taking from old Michaelmas to old Michaelmas, a notice to quit at Michaelmas will be sufficient^b, at least if it be proved, that the tenancy commenced at old Michaelmas^c. So a notice delivered at Michaelmas, 1796, “to quit at Lady Day which will be in the year 1795,” was adjudged to be good; for the intention is clear, and the words, “in the year 1795,” may be rejected^d. So a notice to quit at the expiration of the current year of the tenancy, which shall expire next after the end of one half year from the date of the notice, is sufficient, although no particular day is mentioned^e. It is, however, essentially necessary, that the notice should be to quit at the expiration of the current year of the tenancy; that is, if the defendant hold from Michaelmas, the notice must be given half a year before Michaelmas, to quit at Michaelmas; if from Lady Day, at Lady Day, &c.; for, if a notice to quit at Midsummer be given to a tenant holding from Michaelmas, or *vice versâ*, it will be insufficient^f; and a notice to quit at a particular day is not *primâ facie* evidence of a holding from that day^g, though a contrary doctrine was formerly holden^h, unless it is served personally on

t Per Ellenborough C. J. in Doe d. *Ld. Macartney v. Crick*, 5 Esp. N. P. C. 197.

u Oakapple d. *Green v. Copons*, 4 T. R. 361. But see Doe d. *Leicester*, 2 Taunt. 109.

x Doe d. *Matthews v. Jackson*, Doug. 175.

y Per Heath J. Gloucester Sum. Ass. 1800. *Woodf. Land. & Ten.* p. 224. 2d ed.

z Doe d. *Hinde v. Vince*, 2 Camp. N. P. C. 256. per Sr. A. Mc. Donal, C. B. and S. P. per Ld. Ellen-

borough C. J. in Doe v. *Brookes*, 2 Camp. N. P. C. 257. n.

a Doe d. *D. of Bedford v. Kightley*, 7 T. R. 63.

b 2 Esp. N. P. C. 599.

c Oakapple d. *Green v. Copons*, 4 T. R. 361.

d 2 Camp. N. P. C. 258. n. Doe d. *Ash v. Calvert*, 2 Camp. N. P. C. 388.

e Doe d. *Puddicombe v. Harris*, per Eyre Baron, Dorset Sum. Ass. 1784, 1 T. R. 161.

f 1 T. R. 161.

the tenant, who makes no objection at the time^f. In a case where the notice (which was delivered on the 29th of September) was to quit on the 25th of March, or the 8th day of April, next ensuing, defendant having objected to it on the ground that it did not express with sufficient accuracy the end of the tenancy, and the time when the defendant was to quit, and that at all events it was incumbent on the lessor of the plaintiff to shew that the defendant's tenancy commenced either on the 25th of March or 8th of April, Lord Kenyon C. J. ruled the notice to be sufficient, and that the onus of proving the commencement of his tenancy lay on the defendant^g. N. In this case the demise was laid on a day subsequent to the 8th of April. It will be proper to remark, that where the tenant, being applied to by his landlord respecting the commencement of his holding, informs him that it began on a certain day, and the landlord gives the tenant a notice to quit agreeably to the information received^h, the tenant will be precluded from contending that his tenancy commenced on a different day, even though he can prove that the information which he gave his landlord proceeded on a mistake, and not from an intention to deceive.

A receipt for rent up to a particular day is *prima facie* evidence of the commencement of the tenancy at that dayⁱ.

It is not essentially necessary that the notice should be directed to the defendant^k, if the terms of it shew that the defendant is tenant to the plaintiff, and if it is proved to have been served on the defendant at the proper time. Neither is it necessary for a landlord to give notice to any one but his own tenant^l, although such tenant may have underlet part of the demised premises. A. tenant from year to year^m to B., from Michaelmas, 1801, underlet part of the premises to C. A. without receiving any regular notice to quit, from B., agreed to give him up possession at Michaelmas, 1810, and B. then took possession of all that A. had continued to occupy; but C. having before refused to deliver his part, was served in the February preceding, with a notice to quit at Michaelmas, 1810, from B., to whom he had never paid rent, or otherwise acknowledged as his immediate landlord, but had paid his rent to A. up to Michaelmas, 1808, and had

^f Doe d. *Charges v. Forster*, 13 East, 405. Thomas v. Thomas, 2 Camp. N. P. C. 647.

^g Doe d. *Matthewson v. Wrightman*, 4 Esp. N. P. C. 5. But see Doe v. *Forster*, *sup.*

^h Doe d. *Eyre v. Lambly*, 2 Esp. N. P. C. 635.

ⁱ Per *Ellenborough C. J.* in Doe d.

Castleton v. Samuel, 5 Esp. N. P. C. 174.

^k Doe d. *Matthewson v. Wrightman*, 4 Esp. N. P. C. 5.

^l *Roe v. Wiggs*, 2 Bos. & Pull. N. P. 230.

^m *Pleasant d. Hayton v. Beuson*, 14 East, 234.

tendered him the rent which had accrued since that time, which A. had refused to receive. B. brought an ejectment against C.; it was holden, that the notice was insufficient, B. not having given any regular notice to A. his immediate tenant; and A. not having given any such notice to C.; for without one or other of such notices, C.'s interest in the part underlet continued. Lord Ellenborough observed, "that a tenancy from year to year was determinable either by a regular notice to quit; or, he might say, for the purpose of this case, by a surrender of a part of the premises in the name of the whole: but A. had not done even that; for he merely ceased to reside on the part which he had retained in his own possession, without making a surrender in the name of the whole. But while he was tenant from year to year of the whole, he let off a part to the defendant; and nothing has been done to put an end to the tenancy as to that part." Evidence that the notice was delivered and explained to the servant of the tenant at his dwelling house, though such dwelling house be not situated on the demised premises, is presumptive evidence that the notice came to the hands of the tenant^a, *the servant not being called*. But evidence of the notice having been left at the tenant's house^b, without farther proof of its having been delivered to a servant, who is not called, or that it came to the tenant's hands, is not sufficient. Evidence of the notice being served on the premises^c, on one of two joint tenants, who resided on the premises, is presumptive evidence that the notice reached the other joint tenant, who resided elsewhere.

Waver of Notice.—Where a notice to quit has been given, the lessor must be careful not to do any act which may be construed as an affirmance of the tenancy and a waiver of the notice. A distress for rent, which accrued after the expiration of the time, at which, by the notice, the tenant is to quit, is an acknowledgment of the tenancy^d; so is the acceptance of rent so due^e; but it shall be left to the jury to say whether the money received were received as rent; for whether it shall be a waiver of the notice depends on the intention of the parties, which is a matter of fact to be left to the jury^f (15).

^a Jones d. Griffiths v. Marsh, 4 T. R. 464.

^q Doe d. Barras v. Lucas, 5 Esp. N. P. C. 153.

^p Doe v. Watkins and another, 7 East, 551. Doe d. Ld. Macartney v. Crick

and another, 5 Esp. N. P. C. 196. S. P. Ellenborough C. J.

^q Ward v. Willingale, 1 H. Bl. 311.

^r Goodright d. Charter v. Cordwint, 6 T. R. 219.

^s Doe v. Batten, Cowp. 308.

(15) In the case of a tenancy from year to year, if at the expi-

Ejectment for recovering possession of a farm^t, tried before Lawrence J. at Salop Sum. Ass. 1801. The farm consisted of lands of different descriptions, to be quitted at different times; the arable on the 29th of September, 1800; the pasture and meadow on the 30th of November; the dwelling house, &c. on the 1st of May, 1801. The lessor, on the 21st of March, 1800, served the defendant with a notice to quit the farm at the several times above stated; and the defendant not having quitted the arable on the 29th of September, or the meadow and pasture on the 30th of November, the lessor brought his ejectment; pending which, he delivered to the defendant another notice (16), dated the 20th of March, 1801, to quit the messuage and dwelling house, &c. together with the lands, &c. to wit, the arable on the 29th of September, 1801; the meadow and pasture on the 30th of November, 1801; the dwelling house, &c. on the 1st of May, 1802. It was objected at the trial, that the second notice was a waiver of the first, being a recognition of the tenancy still subsisting; but the learned judge overruled the objection, and a verdict was found for plaintiff. The court (after argument on motion to enter a nonsuit) concurred in opinion with Lawrence J., observing, that it had been admitted, in the course of the argument, that if the plaintiff had not intended that the second notice should operate as a waiver of the first, he might have so explained his intention, by adding that the second notice was to enable him to recover the premises at a subsequent assizes, if, by any accident he should fail at those then ensuing. And, under the circumstances, the defendant must have understood, that this notice was given for that purpose; and it was not possible for the defendant to suppose, that the plaintiff intended to wave the first notice, when he knew the plaintiff was, on the foundation of that notice, proceeding by ejectment to turn him out of the farm (17).

t Doe d. Williams v. Humphreys, 2 East's R. 237.

ration of the year, the landlord consents to accept another person as his tenant, the first tenant is thereby discharged, although he has not given any notice to quit, or made any surrender in writing of his interest. Sparrow v. Hawkes, 2 Esp. N. P. C. 505.

(16) The second notice was copied verbatim from the first, with the alteration only of the dates; and the reason suggested at the bar, why it was given, was, because the person who was to prove the service of the first notice was dangerously ill, and it was apprehended, that the lessor would not be able to prove the notice.

(17) In Messenger v. Armstrong, 1 T. R. 53. which was an

Where rent is usually paid at a banker's, if the banker, without any special authority, receives rent accruing after expiration of notice to quit, it will not operate as a waiver^a.

And here it may be proper to take notice of a doctrine analogous to the subject of the preceding remarks, viz. that acceptance^a of, or a distress^b for, rent due after condition broken, with notice of the breach, is a waiver of the forfeiture.

Ejectment, by a landlord, against his tenant^a, on a proviso for re-entry for non-payment of rent arrear: it appeared, that the lessor had brought covenant for half a year's rent, due on a day subsequent to the day of the demise laid in the declaration in ejectment, and a rule had been obtained to pay the rent arrear into court in that action; it was holden, that the plaintiff had waived the right of entry for the forfeiture; because, by bringing the action of covenant on the lease, he admitted the defendant to be tenant in possession by virtue of the lease; and the tenant having brought the money into court was equivalent to acceptance. The law will always incline against forfeitures, as courts of equity relieve against them.

But acceptance of rent, *without notice* of forfeiture, will not amount to a waiver^a.

A landlord of premises, about to sell them, gave his tenant notice to quit, on the 11th of October, 1806, but promised him not to turn him out^b unless they were sold; and

- ^a Doe v. Calvert, 2 Camp. N. P. C. 387. ^z Roe d. Crompton v. Minshal, B. R. E. 23 G. 2. Bull. N. P. 96. and MSS.
^x Goodright d. Walter v. Davids, Cowp. 803. ^a Gregson v. Harrison, 2 T. R. 425.
^y Adm. Green's case, Cro. Eliz. 3. ^b Whiteacre d. Boulton v. Symonds, 10 East, 13.

action for double rent, it appeared that the defendant was tenant to the plaintiff, under a demise for three years, from Whitsuntide, 1781. Two months previously to Whitsuntide, 1784, plaintiff gave the defendant notice to quit at that time. After the expiration of this notice, viz. on the 3d of June, 1784, the plaintiff gave the defendant another notice to quit at the Martinmas following, or to pay double rent. It was contended, that the first notice was waived by the second; but the objection was overruled; Ld. Mansfield C. J. observing, that where a term is to end on a precise day, there is not any occasion for a notice to quit; that here it ended at Whitsuntide; that the meaning of the first notice was, that if the tenant did not quit, the landlord would insist on double rent; and the second notice only expressed what was meant by the first.

not being sold till February, 1807, the tenant refused on demand to deliver up possession; and on ejectment brought, laying the demise on the 19th of October, 1806, it was holden, that the promise, which was performed, was no waiver of the notice, nor operated as a licence to be on the premises otherwise than subject to the landlord's right of acting on such notice, if necessary; and, therefore, that the tenant, not having delivered up possession on demand, after a sale, was a trespasser from the expiration of the notice to quit.

Acceptance of rent, as rent by a remainder man, will not amount to a confirmation of a lease void as against him^c; but it is an admission of a tenancy from year to year, and the lessee will thereby be entitled to half a year's notice to quit^d.

In order to raise an implied tenancy^e from the receipt of rent, it must appear that the rent was paid and received, as between landlord and tenant, so as to raise a presumption of an agreement for a tenancy from year to year, and not as in the case of a conventional rent, where the payment is made with reference to a supposed tenancy of another kind.

Where, however, tenant in tail^f had received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessee in possession, under a void lease, granted by tenant for life under a power, the rack rent value of which was 30*l.* a-year, it was holden, that such tenant in tail could not maintain an ejectment laying his demise on a day before the delivery of the declaration, without giving the lessee some notice to quit, so as to make him a trespasser at the time of the action brought, after such recognition of a lawful possession, if not as tenant from year to year, at least as tenant at will.

An indenture of lease contained a general covenant to repair, and a further covenant that the tenant should within three months after notice, repair all defects, of which notice had been given. The lease contained the usual clause of re-entry.—It was holden^g that the landlord, who had served a notice to repair, might maintain ejectment, before the expiration of the three months, for a breach of the general covenant to repair; for the notice was not any waiver of the forfeiture.

Where Notice to quit is not required.—The doctrine relative

^c Doug. 51. Cowp. 201. 483.

^d Doe d. Martin v. Watts, 7 T. R. 83.

^e Right v. Bawden, 3 East, 260. See

also 10 East, 188, 9. Doe v. Quigley,

2 Camp. N. P. C. 505.

^f Denn d. Brune v. Rawlins, 10 East, 261.

^g Roe d. Goatly v. Paine, 2 Camp. N.

P. C. 520.

to notices to quit is only applicable to those tenancies, where the time of quitting is not agreed upon between the parties; for, where a lease is determinable on a certain event, or at a fixed time, it is not necessary to give such notice, both parties being apprised of the determination of the term (18). Neither is such notice necessary in a case where the possession is adverse^b, or where the relation of landlord and tenant does not subsist; e. g. if the tenant has attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord^c. But if the acts done by the tenant do not amount to a disavowal of a landlord's title, then the tenant is entitled to notice.

A mortgagor in possession, being only tenant by sufferance, is not entitled to a notice to quit; and consequently if a mortgagor lets another person into possession, as tenant from year to year, such tenant is not entitled to a notice to quit either from the mortgagee^d, or his assignee^e; and this rule holds, although the tenant has been let into possession before the assignment of the mortgage.

A. agreed to demise a house to B., during the joint lives of A. and B.; B. entered in pursuance of the agreement, and before any lease was executed, died^f; after which B.'s executor took possession of the house; it was holden, that A. might maintain ejectment against the executor, *without a notice to quit*; because the death of B. determined his interest, and consequently there was not any interest vested in the executor.

Where a person obtains possession of a house without the privity of the landlord, and afterwards a negotiation takes place for a lease, upon the terms of which the parties eventually differ, a notice to quit is not necessary^g. So where a

^b Doe v. Williams, Cowp. 629.

^c Throgmorton v. Whelpdale, H. 9 G.

^d 2. Bul. N. P. 96. Doe v. Pasquali, Peake's N. P. C. 196.

^e Keech v. Hall, Doug. 28.

^f Thunder d. Weaver v. Belcher, 3 East, 448.

^g Doe d. Broomfield v. Smith, 6 East, 530..

^h Doe d. Knight v. Quigley, 2 Camp; N. P. C. 505.

(18) "If there be a lease for a year, and by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary, for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other, half a year's notice before the expiration of the next or any following year." Per Ld. Mansfield C. J. in *Right v. Darby*, 1 T. R. 162.

person enters under an agreement for a lease, without a stipulation that in case a lease is not executed he shall hold for one year certain, if a lease be tendered to the occupier and he refuses to execute it, the lessor may eject him without any notice to quit^o. But where the lessor of the plaintiff had put the defendant into possession under an agreement for the purchase of the land, it was holden², that he could not without a demand of the possession again, and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat the defendant as a wrong-doer and a trespasser, as he assumed to do by his declaration in ejectment. The defendant's confession of a lease from the lessor to the plaintiff, under the common rule, is not sufficient to determine the possession; for the rule is only entered into after the delivery of the declaration in ejectment, and can never prove that the defendant was a trespasser before that time.

VI. *Of the Mode of proceeding in Ejectment, and herein of the Declaration.*

THE mode of proceeding in the action of ejectment now in use, is not, as in other actions, by suing out a writ; but A., the party claiming title, before the essoign day of the term, serves a copy of a declaration, with a notice subscribed, upon B. the tenant in possession of the lands or tenements; or, if there be several tenants, on each¹ of them.

The declaration states that A. on a certain day, (that is, some day after A.'s title to the land, &c. accrued), demised to John Doe two messuages, one hundred acres of land, &c. situate, &c. for the term of ——— years, by virtue of which demise the said John Doe entered and was possessed, until Richard Roe afterwards ejected him.

Such is the outline of the declaration, which is for the most part a fiction; for, except in a few instances, there is neither lease, entry, nor ouster; and the parties, viz. the plaintiff, and the defendant, the ejector, usually termed the casual ejector, are fictitious persons. In some respects,

^o Per Curiam, *Hegan v. Johnson*, ^p *Right d. Lewis v. Beard*, 13 East, 2 Taunt. 149, 210.

^q Bull. N. P. 98.

however, care and accuracy are necessary in framing this declaration; as, 1st, The venue must be laid in the county in which the lands lie; for this is a local action. 2d, If there be several lessors, the demise stated in the declaration must be such as their title will warrant; as if the lessors of the plaintiff be joint-tenants' or parceners (19), the declaration must allege a *joint* demise; if tenants in common, a several demise by each of their several parts' (20). In the latter case the declaration must contain as many counts as there are tenants in common lessors of the plaintiff. But tenants in common may join in a lease to a third person, and then the declaration may state a demise by such lessee. 3d, The day, on which the demise is stated to have been made, must be some day after the title of the lessor of the plaintiff accrued; otherwise the plaintiff will be nonsuited; for not being entitled to the possession he cannot make a lease. Hence, in the case of a fine levied with proclamations, where an actual entry is necessary to complete the lessor's title, the demise must be laid on a day subsequent to the entry^t. But the surrenderee of a copyhold estate, *after*

r Bull. N. P. 107.

Heatherley v. Weston, 2 Wils. 232.

* Mantle v. Wollington, Cro. Jac. 166.

S. P.

Moore v. Thursden, Show. 342.

t Berrington v. Parkhurst, Str. 1086.

(19) In an action of *ejectio firmæ*, a lease was made by two parceners, and it was declared *quod dimiserunt*: an exception was taken, on the ground, that the lease was the several lease of each of them for her moiety, and holden good. Moor, 682. pl. 939. This case was denied by Holt C. J. in Ld. Raym. 726. who ruled, that parceners *might* join in ejectment. Holt's opinion is confirmed by a passage in 1 Inst. 180. b. where it is said, that joint-tenants must jointly implead, and jointly be impleaded by others, which property is common between them *and parceners*; and Holt's opinion is adopted in Buller's N. P. 107. It is corroborated by the following position in 1 Rol. Ab. 878. pl. 5. If two parceners join in a lease for years by indenture, this is but one lease; for they have not several frank-tenements, but shall join in an assize. And in Stedman v. Bates, Ld. Raym. 64. it was holden that parceners must join in an avowry for rent arrear.

(20) "Declaration in ejectment was of a joint demise of A. and B., and on the evidence it appeared that they were tenants in common; the plaintiff failed." M. 3 Jac. Blackasper's case. Noy. n. 43. Hal. MSS. See Noy. 13. cited in Hargrave's n. (7) 1 Inst. 45. a. But payment of rent to the agent of A. B. C. is an admission that the party holds under A. B. C. jointly, and will support a joint demise, unless it be expressly proved that they were entitled in a different manner. Doe d. Clarke and others v. Grant, 12 East, 221. See also Doe v. Read, 12 East, 57.

admittance, may maintain an ejectment against the surrenderor, on a demise laid on a day between the times of surrender and admittance; because, as against all persons, but the lord, the title of the surrenderee, after admittance, is perfect as from the time of the surrender, and shall relate back to it^a. So in ejectment by an administrator, the demise may be laid on a day after the intestate's death, but before administration granted; for the administration, when granted, will relate back, and shew the title to have been in the administrator from the death of the intestate. 4th, The demise may be for any number of years; this part of the declaration being a fiction, it will not be any objection that the lessor of the plaintiff had not power to grant a term of equal duration with that alleged. Hence, tenant from year to year, may declare on a demise for seven years^b. Care should be taken that the term stated be long enough to admit of the plaintiff's recovering possession before it expires (21). 5th, If the ejectment be brought by a corporation aggregate^c (22), an infant, or for tithes^d, the declaration ought to state that the demise was by deed; and, in the case of the infant, it ought to appear that some rent was

^a *Holdfast v. Clapham*, 1 T. R. 600.
^x *Doe v. Porter*, 3 T. R. 13.
^y *Carth.* 390. This omission will be
aided by verdict. *Bull. N. P.* 98.

^z *Swadling v. Piers*, Cro. Jac. 613.
Omission cured by verdict, *Partridge*
v. Ball, *Ld. Raym.* 136.

(21) But the courts have been very liberal in permitting plaintiffs to amend in this instance. In the case of *Power d. Boyce and another v. Rowe*, (in Ireland, Pasch. 1802.) the term expired, whilst the case was depending in the Exchequer Chamber; the judgment having been affirmed, a motion was made to enlarge the term, and the court (Lord Redesdale C. assisted by the chief justices) on the authority of *Dickens v. Greenville*, *Carth.* 3. and *Vicars v. Haydon*, *Cowp.* 841. made an order to amend the record by enlarging the term. A writ of error was then sued, returnable in parliament, and upon the record so amended being transmitted, the plaintiff in error complained, by petition, to the House of Lords of the amendment made by the Court of Exchequer Chamber as an alteration of the record, and prayed a writ of certiorari to be directed to the Court of Exchequer C. to transmit the record in its original form. Upon debate, their lordships refused the writ, holding the amendment to have been properly made, and finally affirmed the judgments on the merits. See *Lessee of Lawlor v. Murray*, 1 Schoales and Lefroy's Rep. 81. n. (a.)

(22) A corporation aggregate cannot make a lease for years without deed, in respect of the quality of the incorporation. 1 Inst. 85. a.

reserved; but it is not necessary that the deed should be proved^a. In ejectment for tithes the declaration ought to set forth the nature of the tithe^b. 6th, With respect to the description of the thing demised, it may be observed, that regularly it ought to be made with such certainty, that the sheriff may know, from an inspection of the record, what he is to deliver possession of. But the strictness of this rule has been relaxed in many instances, on the ground that the sheriff is to take his information from the party recovering (23). 7th, The ejectment or ouster must be stated to have been made after the commencement of the supposed lease; but it is not necessary, although usual, to mention any particular day^c. It is sufficient, if it appear on the face of the declaration, that the ouster was after the term commenced, and before action brought.

Of the Notice subscribed to the Declaration.—To the declaration is subscribed a notice to the tenant in possession, from the casual ejector, and subscribed with his name, signifying, that unless the tenant appear, &c. in the term (24) next ensuing that in which the declaration is served,

a *Furley v. Wood*, 1 Esp. N. P. C. 198. b *Ball. N. P. 99.*

Keuon C. J.

c *Merrel v. Smith*, Cro. Jac. 311.

(23) *Ejectio firmæ* of 30 acres of land in D. and S. The defendant was found guilty of 10 acres, and as to the residue, not guilty; and it was moved, in arrest of judgment, that it is uncertain in which of the villis this land lay, and therefore no judgment can be given, nor any execution. But the objection was overruled; and it was adjudged for the plaintiff; *for the sheriff shall take his information from the party* for what 10 acres the verdict was. *Portman v. Morgan*, Cro. Eliz. 465. See also to the same effect, *Cottingham v. King*, 1 Burr. 623. and *Connor v. West*, 5 Burr. 2673.

(24) This is the form of notice in a country cause; but if the lands lie in London or Middlesex, regularly the notice ought to be to appear on the first day of the term, whether the proceedings are by bill or original. By the first day of the term here is meant the first day of full term. Although in some cases the court will permit an amendment of the notice, yet it is better to observe the rule here laid down; for where in ejectment brought by original in Middlesex, the notice was to appear on *the morrow of the Holy Trinity*, the court set aside the judgment, which had been given on the usual affidavit against the casual ejector; observing, that the notice was designed to inform the lay gents of the time of appearing; and that, therefore, it should be expressed in such terms as they might understand. *Doe d. Joyne v. Roe*, T. 10

and by rule of court, cause himself to be made defendant, in the room of the casual ejector, he shall suffer judgment to be entered against him, and the tenant will be turned out of possession. At the time when the copy of the declaration and notice is delivered to the tenant in possession, he must be informed of the nature of the proceeding, and the notice should be read to him, or the substance of it fully explained. The delivery of the declaration and notice, accompanied with the explanation above-mentioned, is called *service* of a declaration in ejectment.

VII. *Of the Service of Declaration.*

THE tenant or tenants in possession may be served personally at any place. But in cases where tenant in possession cannot be served, service on the wife of tenant in possession must be either on the land in question, or at the dwelling house of the husband. In this case, from the fact of the wife being served, on the premises^d, or at the dwelling house of the husband, though not on the premises, the court presumes that the parties are living together as man and wife, and that the husband has notice of the proceedings; and, on this presumption, such service is deemed good.

Service on the servant, child, or niece, of the tenant in possession, *on the premises*, is good service, provided the service be afterwards acknowledged by the tenant himself; but a mere acknowledgment of the wife is not sufficient^e.

If the tenant or his wife refuse to receive the declaration, &c. a copy of it should be left for them, or affixed to the premises; so if there be not any person in possession of the thing demised, a copy of the declaration and notice should be affixed to some conspicuous part.

^d Dec d. *Morland v. Bayliss*, 6 T. R. 765. ^e 1 Bos. & Pul. 324.

G. 2. MSS. See also *Holdfast v. Freeman*, Str. 1049. where the notice was to appear on the *essoign-day* of the term, and holden bad. If the notice is subscribed in the name of the nominal plaintiff, instead of the casual ejector, the court will not set aside the proceedings for irregularity. *Hazelwood v. Thatcher*, 3. T. R. 351. in which the case of *Peaceable v. Troublesome*, 1 Barnes, 4to. edit. 172. was over-ruled.

ment is made within the last four days of the term, the tenant has until two days before the essoign day of the subsequent term to appear in.

2. Where the Premises lie elsewhere than in London or Middlesex.

The motion for judgment in this case may be made at any time within the term; because the tenant has four days after the end of such term to appear in.

If the lands lie in a county^h, where the assizes are holden only once a year, the tenant has four days after the end of the term next preceding the assizes to appear in.

If the tenant in possession does not appear within the limited time, the plaintiff must search for a plea, and if he does not find any, he must procure from the clerk of the rules in B. R. and secondary in C. B. a rule for judgment by default against the casual ejector (25), which he must carry to the clerk of the judgments in B. R. and prothonotary in C. B.ⁱ who thereupon will sign judgment, and make out a writ of possession, which, being delivered to the sheriff, the plaintiff will be put into possession of the premises in question.

If the tenant appears, then he enters into the consent rule, the substance of which is as follows:

1st, He consents to be made defendant instead of the casual ejector. 2d, To appear at the suit of the plaintiff; and if the proceedings are by bill, to file common bail. 3rd, To receive a declaration and plead, Not Guilty. 4th, At the trial of the issue, to confess lease, entry, and ouster, and insist upon title only.

To this rule are added the following conditions: 1st, If at the trial (26) the defendant shall not confess lease, entry,

^h Impey's Pr. B. R.

ⁱ In C. B. a warrant of attorney must accompany the other papers.

(25) By an old rule of court M. 33 Car. 2. 1681, B. R. it was required that a writ of latitat should be sued out against the casual ejector, and common bail filed for him before judgment could be signed. But now filing common bail is sufficient.

(26) The practice is to call the defendant; and on non-appearance, or refusal to comply with the rule, to call the plaintiff and nonsuit him; then the cause of the nonsuit being endorsed on the

and ouster, whereby plaintiff shall not be able to prosecute his suit, defendant shall pay to plaintiff the costs of the non-pros, and judgment shall be entered against the casual ejector by default. 2d, If a verdict shall be given for defendant, or plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant.

In the court of C. B. the defendant consents to confess lease, entry, and ouster, of so much of the tenements specified in the plaintiff's declaration, as are in the possession of the defendant or his tenants; but, in the common consent rule of the court of B. R., the defendant consents to confess lease, entry, and ouster, generally. On the ground of this variance, it was insisted in B. R., that it was unnecessary to prove defendant in possession of the premises, because, by entering into the rule *generally*, defendant must be understood to have admitted himself tenant in possession of the premises described in the declaration. But the court were of opinion, that whether the defendant entered into the consent rule of C. B., or the general rule in B. R., it was essentially necessary to prove, that the defendant was in possession of the premises in question.

N. The defendant may even in the court of B. R. narrow his consent to confess lease, entry, and ouster, to so much of the tenements specified in plaintiff's declaration, as are in possession of defendant or his tenants. But if he does¹, his attorney must immediately deliver to the plaintiff's attorney, a note in writing of the tenements so being in possession of the defendant or his under-tenants.

Such are the proceedings when the matter is litigated be-

¹ *Goodright d. Balch v. Rich*, 7 T. R. 327.

¹ 1 R. T. 15 Car. 2. B. R.

postea, the plaintiff is entitled to judgment and execution thereon immediately after the trial, according to the practice of the court of C. B. (*Fairfax v. Bentley*, C. B. Runn. 242. edit. 1795,) but in B. R. not until the *postea* be regularly returned on the day in bank. (*Lord Palmerston v. Copeland*, 2 T. R. 779.) Where there are several defendants for the same premises, and some appear and confess lease, entry, and ouster, but others do not, the practice is, to enter a verdict generally against those who do appear, and to enter a verdict against the plaintiff for those who do not appear; but then the cause of such verdict is endorsed on the *postea*, which as to them entitles the plaintiff to judgment against the casual ejector for such lands as were in their possession. *Lord Raym.* 729.

tween the lessor of the plaintiff and the tenant in possession only. Where the tenant in possession is merely an under-tenant to some other person, as soon as the declaration in ejectment is delivered to him, he is obliged, by stat. 11 Geo. 2. c. 19. s. 12. to give notice of such delivery to his landlord, under pain of forfeiting three years improved or rack rent of the premises holden. N. This penalty does not attach on the tenant of mortgagor, who omits to give him notice of ejectment brought by mortgagee, 1 T. R. 647. because the statute only extends to cases where ejectments are brought inconsistent with landlord's title.

This wise provision of the statute was intended to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land. And by the same statute, s. 13. the court where the ejectment is brought, is empowered to suffer the landlord^m to make himself defendant with the tenant, if he shall appear; and, by the same clause, although if the tenant shall refuse or neglect to appear, judgment shall be signed against the casual ejector; yet the landlord shall be permitted to appear by himself, on his consenting to enter into the usual rule; and judgment against the casual ejector shall be staid *until further order*ⁿ.

Who shall be considered a landlord, within the meaning of this act, is sometimes a difficult question to determine: the following persons have been so considered; 1. Devisee in trust, 4 T. R. 199. 2. Mortgagee, 8 T. R. 645. N. It does not appear by the report, whether the mortgagee in this case had ever received rent.

The following persons have not been deemed landlords within the meaning of this act: 1. A devisee, where the ejectment was brought by the heir; *Roe d. Leake v. Doe*, M. 29 G. 2. C. B. Bull. N. P. 95. 2. A mortgagee, who, had never received rent, *ib.* 3. *Cestui que trust*, not having been in possession. 3 T. R. 783.

In all cases of vacant possession^o, unless such as are within stat. 4 Geo. 2. c. 28. (which see in next section) no person claiming title will be let in to defend; but he, who can first seal a lease on the premises, must obtain possession, and any other person claiming title may eject him if he can; and by the course of the court, no defence can be made in these

^m Landlord might have defended with tenant before this statute, Salk. 257. 7 Mod. 70. 3 Barr. 1301. But the 3d provision in this section is new.
ⁿ See *Jones v. Edwards*, Str. 1241.

^o Arg. per Eyre Serj. and said by the Reporter to be the constant practice. Exp. Beauchamp, Barnes, 4to. edit. 177.

cases but by the defendant in the ejectment, who is a real ejector.

In *Martin v. Davis*, Str. 914. the court refused to let the parson of Hampstead chapel defend for right to enter and perform divine service only; notwithstanding the case of *Hollingsworth v. Brewster*, Salk. 256.; observing, that that case had often been denied since.

IX. Of the Proceedings in Ejectment, directed by Stat. 4 G. 2. c. 28. s. 2. in order to obviate the Difficulties attending Re-entries at Common Law, for Non-payment of Rent Arrear—Of the Proceedings where the Possession is vacant.

By stat. 4 Geo. 2. c. 28. s. 2. it is enacted, " That in *all* cases between landlord and tenant; when half a year's rent shall be in arrear, and the landlord has a right of entry for non-payment thereof, he may, *without a formal demand or re-entry*, serve a declaration in ejectment; or in case the same cannot be legally served, or no tenant be in actual possession, affix the same upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, &c. comprised in the declaration in ejectment, and such affixing shall be deemed legal service; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall appear by affidavit, or be proved on the trial, in case the defendant appears, that half a year's rent was due before the declaration served, and that no sufficient distress was to be found on the premises, counter-vailing the arrears then due, and that the lessor had power to re-enter; *then, and in every such case*, the lessor in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and re-entry made; provided, that if the tenant, at any time *before the trial* in such ejectment, shall pay or tender to the landlord or his attorney, or pay into

" court, the rent arrear and costs, all further proceedings on
 " the ejectment shall be discontinued" (27).

It has been supposed that the preceding statute only applied to cases of ejectment brought after half a year's rent due, *where no sufficient distress was to be found upon the premises*. But in a late case (*Roe v. Davis*, 7 East, 363.) it was holden, that the statute was more general in its operation.

The application to the court^a, on the part of the tenant, to stay proceedings, must, by the very terms of the act, be made *before trial*.

In ejectment by a landlord^b, the tenant moved to stay proceedings, upon payment of rent arrear and costs. On a rule to shew cause, it was insisted, for the plaintiff, that the case was not within the preceding statute; because it was not an ejectment founded singly on the act, but it was brought likewise on a clause of re-entry in the lease for not repairing, and the lease was produced in court. However, the rule was made absolute, with liberty for the plaintiff to proceed upon any other title.

Where an ejectment is brought on the preceding statute for the forfeiture of a lease^c, acceptance of rent afterwards, by the landlord, has been holden a waiver of the forfeiture; for it is a penalty, and by accepting the rent, the party waves the penalty.

Landlord having a right of re-entry for non-payment of rent brought an ejectment and proved a demand of half a year's rent *after* the day on which it was due, and a refusal on the part of the defendant to pay it, before the re-entry. It appeared that there was a sufficient distress on the premises during the whole time. It was holden^d, that the lessor of the plaintiff could not recover either at common law, or under the preceding statute; not by the former, because the rent was not demanded on the day when it became due; Co. Lit. 201. 7 Rep. 28.; nor by the latter, because there was a sufficient distress on the premises.

^a *Roe v. Davis*, 7 East, 363.
^b *Pured. Withers v. Sturdy*, H. 1752.
 Ball. N. P. 97.

^c *Per Aston J. in Doe v. Batten*,
 Comp. 247.
^d *Doe d. Forster v. Wandlass*, 7 T. R.
 117.

(27) Before this statute, courts of law and equity exercised a discretionary power of staying the lessor from proceeding at law, in cases of forfeiture for non-payment of rent, by compelling him to take the money due to him. See the opinion of Lee C. J. in *Archer v. Snapp*, Andr. 341. 2 Salk. 597. 3 Mod. 345. 10 Mod. 383. 2 Vern. 103. 1 Wils. 75. 2 Str. 900.

Of the Proceedings where the Possession is vacant.
 —In cases between landlord and tenant, where one half year's rent is in arrear, and the landlord has a right of entry, the mode of proceeding, where the premises are untenanted, is marked out by the preceding statute. In all other cases of a vacant possession the mode of proceeding is thus:

A. (the person claiming title) by letter of attorney empowers B. to execute a lease, in the name of A., of the premises in question, to C. This lease is executed on the premises, B. and C. only being thereon; then B. leaves C. in possession, who is turned out by D., to whom, while on the premises, E. delivers a declaration in ejectment. A rule to plead having been given, and not complied with, a motion is made for judgment, which is granted of course. This motion must be supported by an affidavit of the above-mentioned proceedings, viz. the execution of the power of attorney, the lease, entry, ouster, and delivery of declaration; a copy whereof is annexed to the affidavit.

A. made a lease of an alehouse in London^a, for years. The lessee, before the expiration of the term, left it, and took another house in Wapping; but there was some liquor and old vessels left in the first-mentioned house, and the doors were locked. Upon this the landlord sealed a lease on the premises, and brought an ejectment, as on a vacant possession, and accordingly had judgment and execution; to set aside which, a motion was made. In addition to the foregoing facts it appeared, that only one quarter's rent was in arrear, and that the landlord had seen his tenant a short time only before he brought the ejectment. Lord Hardwicke C. J.—“If only one quarter's rent was in arrear, the landlord could not proceed against the tenant on the stat. 4 Geo. 2. c. 28. But then taking this as it stood at common law, the question will be, whether this was such a vacant possession as to enable the landlord to bring an ejectment in this manner. For though a tenant does not live on the premises, yet it cannot, from that circumstance alone, be called a vacant possession; as if a person uses one house and lives in another, that will be a good possession of both. Here the tenant had actual possession of the premises, by keeping his liquor there, and, as appears, was such a person as the landlord might have served personally with an ejectment; for a declaration in ejectment may be served on

^a *Savage v. Dent*, M. 10 G. 2. B. R. MSS. 2 Str. 1064. Ball. N. P. 97. S. C. shortly stated.

the tenant himself any where, though the wife can be served with it only on the premises (28). I remember a case where a person in the Fleet was served with an ejectment. If the tenant, in this case, sometimes absconded, and only appeared on Sundays, then the landlord should have applied to the court for a special rule, as to the service of the declaration in ejectment." Probyn J. mentioned a case, where hay was left in a barn by a tenant, and that was holden sufficient to keep the possession. The court ordered the judgment and execution to be set aside with costs.

X. Of the Pleadings and Defence.

SPECIAL pleas, either in bar or abatement, are seldom pleaded to this action; because, according to the modern practice, if the defendant appears, he generally enters into the consent rule, by the terms of which he is bound to plead the general issue, Not Guilty^a. There is one plea, however, which is sometimes pleaded to this action, namely, a plea of ancient demesne^b; but this being a dilatory plea cannot be pleaded after the four first days of the term^c; neither can it be pleaded without an affidavit to verify the fact^d; but quære, for in *Doe d. Morton v. Roe*, B. R. H. 49 G. 3. 10 East, 523. where application was made for leave to plead ancient demesne, the master referred the court to a case in his note book, where it had been holden, that it was not necessary to verify this plea by an affidavit^e. It was admitted, however, that it was necessary to apply to the court for leave to plead this plea; and in this case, the application having been made on the last day of the four first days of the term, the court directed the party applying to plead instanter, and granted him a rule calling on the other party to shew cause why the plea should not be allowed. N. The application was supported by an affidavit stating that the lands in question were *holden* of A. B. as of his manor of F., which manor was holden in ancient demesne, and that there was a court of ancient demesne held within the manor

x *Runn. Eject.* 238.

y *Alden's case*, 5 Rep. 105.

z *Denn d. Wroot v. Penn*, 8 T. R. 474.

a *Hatch v. Cannon*, C. B. 3 Wils. 51.

b See also *Goodright v. Shuffill*, Ld.

Raym. 1418. S. P.

(28) Or at the dwelling house of the husband, if it appears that wife is living with husband. Vid. 4 T. R. 465.

and suitors thereof, in which court, and before which suitors, the lessor of the plaintiff might have proceeded in ejectment. According to Wilmot J. in *Doe d. Rust v. Roe*, it ought also to have been shewn that the lessor of the plaintiff had a freehold interest (29). To this plea, the plaintiff may reply, that the land is pleadable at common law, and traverse that the manor is ancient demesne. *Com. Dig. Abatement*, (D. 1.) cites, *Rast. Ent.* 58. b. *Show.* 271.

Of the Defence.—As an action of ejectment is founded on a right of entry in the party claiming title, if the defendant can shew that such right has been tolled or taken away, it will be a sufficient defence to the action. A right of entry may be taken away by descent, by discontinuance, by fine and non-claim, or by statute of limitations.

1. *Of Descents which toll Entries.*—By the common law, descents of corporeal inheritances in fee simple take away the entry of him that has right^c; as if a disseisor die seised, and the land descends to his heir, the entry of the disseisee is thereby taken away, unless there has been a continual claim^d; the like law is of an abatement or intrusion, and of the feoffees or donees of abators and intruders^e. But by stat. 32 H. 8. c. 33. “The dying seised of any disseisor, of and in any lands, &c., having no title therein, shall not be deemed a descent to take away the entry of the person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled.”

By force of this statute^f, if the disseisor die seised within five years after the disseisin, though there be not any continual claim made, yet such dying seised shall not take away the entry of the disseisee; but after the five years, there must be such continual claim as there was at the common law. But this statute does not extend to any feoffee or donee of the disseisor; and it is said that abators and intruders are not within it^g. These, therefore, remain as at common law.

Descent of a corporeal inheritance in fee tail^h takes away the entry of him that has right; as where a disseisor makes

c Litt. s. 385.
d Litt. s. 414.
e 1 Inst. 237. b.

f 1 Inst. 256. a.
g 1 Inst. 238. a.
h Litt. s. 386.

(29) “The jurisdiction of the lords court extends to land holden of the manor only, and not to land, parcel of the manor. Per Treby C. J. *Salk.* 196.

a gift in tail, and the donee has issue and dies seised, and the issue enter; this will bar the entry of the disseisee.

From the preceding authorities it appears, that to constitute a descent, which shall take away an entry, there must be a dying seised in demesne of a corporeal inheritance, either in fee, or fee tail; and in those cases to which the statute 32 H. 8. c. 33. extends, five years quiet possession. Whether the descent be in the collateral line, or lineal, is immaterial^l. But a dying seised for term of life, or a descent of a reversion or remainder, will not take away an entry^k; because, for this purpose it is essentially necessary that the disseisor should die seised both of the fee and freehold also^l.

The descent, both of the fee and freehold, must be immediate, otherwise the entry will not be barred. Hence, if feme disseisoress take husband, and hath issue and dies, and after the husband dies^m, such descent will not take away the entry of the disseisee; because the heir comes not to the fee and freehold at once, the latter having been suspended until the death of the father, who was tenant by the curtesy.

The doctrine of descent cast, tolling entry, does not affect copyhold or customary estates, where the freehold is in the lordⁿ, nor cases, where the party has no remedy but by entry, as a devisee^o.

2. *Entry barred by Discontinuance.*—A discontinuance of estate, in lands or tenements, signifies such an alienation, made or suffered by any person *seised*, of an estate tail or in auter droit, *in things which lie in livery*^p, as takes away the entry of the person entitled, after the death of the alienor.

At common law, an estate may be discontinued five ways:

1. By feoffment. 2. By fine. 3. By common recovery.
4. By confirmation: and 5. By release with warranty.

A grant, by deed or fine, of such things as lie in grant and not in livery^q, does not work any discontinuance.

An estate tail cannot be discontinued, unless the reversion or remainder, immediately expectant on the estate tail, be also discontinued^r.

An estate tail cannot be discontinued^s, except where he

i 1 Inst. 239. b.

k Litt. s. 387, 388.

l 1 Inst. 239. b.

m Litt. s. 394. 1 Inst. 241. b.

n Doe d. Cook v. Danvers, 7 East, 299.

o 1 Inst. 240. b.

p 1 Inst. 325.

q Litt. s. 618. 1 Inst. 332. a.

r Litt. s. 625, 626.

s 1 Inst. 347. b. See also Litt. s. 640.

658.

who makes the discontinuance was once seised by force of the tail; that is, seised of the freehold and inheritance of the estate in tail, and not of a remainder or reversion expectant upon a freehold.

Hence, if there be tenant for life^t, the remainder in tail, &c. and tenant for life, and he, in the remainder in tail, levy a fine, this is not any discontinuance or divesting of any estate in remainder, but each of them passes that which they have power and authority to pass.

By the determination of the wrongful estate^u, the discontinuance is determined.

By stat. 32 H. 8. c. 28. tenant in tail may grant leases for three lives, or one and twenty years, which shall bind the issue in tail, but not those in remainder or reversion.

By stat. 4 H. 7. c. 24. (explained by stat. 32 H. 8. c. 36.) fines with proclamations, levied by tenants in tail, operate as a bar to the issue in tail; but still, in some cases, remain discontinuances to those in reversion or remainder.

By stat. 11 H. 7. c. 20. "If a woman has any estate tail jointly with her husband, or only to herself, or to her use, in any lands or hereditaments *of the inheritance or purchase of her husband*^x, or given to the husband and wife in tail, by any of the *ancestors of the husband*, or by any other person seised to the use of the husband or his ancestors, and shall hereafter, being sole, or with any other after-taken husband, discontinue, &c. the same; every such discontinuance shall be void, and it shall be lawful for every person to whom the interest, title, or inheritance, after the decease of the said woman should appertain, to enter, &c."

This statute is, for the most part, confined to conveyances by *the husband or his ancestor*, for the advancement of the wife^y. Hence, if land be settled by the ancestor of the wife, in consideration of the marriage, and of money paid by the husband, it is not within this act; for it shall be intended that the advancement of the wife was the principal cause of the gift^z. But where the conveyance is by a stranger, in consideration of the wife's fortune paid by her father to the vendor, and other money paid by the husband, it is within the act^a. So if the conveyance is by the husband or his ancestor, in consideration of marriage, although it be

^t 1 Inst. 302. b.

^u 1 Inst. 333.

^x See 1 Inst. 326. b.

^y Cro. Eliz. 2.

^z Kynaston v. Lloyd, Cro. Jac. 624.

^a Piggot v. Palmer, Moor, 250.

joined with a money consideration, yet it is within the statute^b. But no estate is within the meaning of this statute, unless it be for the jointure of the wife; hence, although an estate devised by the husband to the wife in tail, with remainder over to a stranger in fee, be within the words, yet it is not within the meaning of the statute; for it shall not be intended to be for a jointure^c, where no inheritance is reserved to the husband or his heirs; and the meaning of the statute is, that the wife shall not prevent the lands descending to the heirs of the husband.

If the issue in special tail, with reversion in fee expectant, levy a fine, and afterwards his mother, being tenant in tail within this act, make a lease for three lives (not warranted by stat. 32 H. 8. c. 28.) living the issue, the conusee may enter^d. But if the reversion in fee had been in another, the conusee could not enter; because he would have nothing but by estoppel; nor the heir, because he had concluded himself by the fine^e; nor his issue^f.

At the common law, if a man seised of lands, in right of his wife, in fee simple, fee tail, or for life, had made a feoffment, &c. and died, the wife could not have entered: but by stat. 32 H. 8. c. 28. s. 6. "No fine, feoffment, or other act made, suffered, or done by the husband only (30) of any manors, &c. being the inheritance or freehold of the wife (31) during the coverture, shall make a discontinuance thereof."

3. *Entry barred by Fine and Non-claim.*—A fine, at the common law, or a fine without proclamations, levied by a tenant of the freehold, not being under any disability^h, was a perpetual bar to all persons who had right and no impediment at the time of the fine levied, and who did not claim within a year and a day after the fine levied, and execution

b Kirkman v. Thompson, Cro. Jac. 475. e Ward v. Walthew, Cro. Jac. 175.

f Lincoln College case, 3 Rep. 61. a.

c Foster v. Pitfall, Cro. Eliz. 2. 1 g Litt. s. 594.

Leon. 261. S. C.

h Shep. Touch. 19. Hargrave's Co.

d Brown's case, 3 Rep. 51. b.

Lit. 121. a. n. (4).

(30) A feoffment by the husband and wife is within this statute; because, in substance, it is the act of the husband only. 1 Inst. 326. a.

(31) Where husband and wife are jointly seised to them and their heirs, or the heirs of *their two bodies*, of an estate made during the coverture, and the husband makes a feoffment in fee and dies, the wife may enter; although it was the inheritance of them both. 1 Inst. 326. a. Greeneley's case, 2d Resol. 8 Rep. 72. a.

thereupon. But this puissance of a fine was taken away by stat. 34 Edw. 3. c. 16. by which it was enacted, "that the plea of non-claim should not be any bar in future." Great inconveniences having resulted from the provisions of this statute, the legislature again interposed, and by stat. 1 R. 3. c. 7. and 4 H. 7. c. 24. the ancient law was revived, though with some modification; proclamations being required to make fines more notorious, and the time for claiming being enlarged from one year to five years. The stat. 4 H. 7. c. 24. (which is nearly a transcript of stat. 1 R. 3.) having directed in the first place, that every fine, after the engrossing thereof, shall be read and proclaimed openly in court the same term, and the three next following terms, at four several days in each term, proceeds to enact, "that the proclamations being thus made, the fine shall conclude as well privies (32) as strangers; *except* women covert, persons within twenty-one years of age, in prison, or out of the realm, or not of whole mind at the time of the fine being levied, not parties to such fine, so as the said women co-

(32) Although the issue in tail were privies to the ancestor, yet inasmuch as the statute *de donis* (13 Edw. 1. c. 1.) had *expressly* ordained that tenants in tail should not have power to alien the lands entailed, doubts were raised, whether fines, levied with proclamations by the ancestor, would by force of this stat. 4 H. 7. c. 24. bar the issue in tail. To remove these doubts, it was enacted by stat. 32 H. 8. c. 36. s. 1. "that all fines levied with proclamations according to stat. 4 H. 7. c. 24. by any person of 21 years of age, of lands, &c. before the fine levied entailed to the person levying the fine, or to any ancestor of the same person, in possession, reversion, remainder, or use, immediately after proclamations made, should be adjudged a bar against him and his heirs claiming only by force of such entail, and against all others claiming only to his use, or to the use of any heir of his body." This statute, however, contains several exceptions, particularly one of fines of lands, of which the reversion is in the crown. In consequence of this exception, the question again arose in the *E. of Derby's* case, whether a fine depending wholly on the 4 H. 7. was a bar to the issue in tail; eight judges against three held that it was. *T. Rayn.* 260. 286. 319. 339. *Pollexf.* 491. *Skin.* 95. 2 *Show.* 104. *T. Jo.* 237. See further on this subject *Mr. Hargrave's* excellent note, *Co. Lit.* 121. a. n. (1). N. A fine levied by tenant in tail will bar the estate tail, but not the remainders or reversion expectant thereon. Where a fine is levied by tenant in tail, who dies before all the proclamations are past, yet will the issue in tail be barred, provided the proclamations are afterwards duly made, *Purslow's* case, cited 3 Rep. 90. b.

"vert, persons within age, &c. or their heirs (33), pursue their right by action or entry, within five years after the removal of their respective disabilities." Then follow the saving clauses, which are, 1st, saving to every person and their heirs (*other than parties*) such right as they have at the time of such fine engrossed, so that they pursue their claim by action or entry within five years after the proclamations (34). 2d, Saving to all other persons such right, claim, and interest, as first (35) shall accrue after the proclamations, by force of any gift in tail, or by any other matter had and made *before* the fine levied, so as they pursue their right within five years after the same shall grow

(33) By this provision, the rights of those persons who are under disabilities, and of their heirs, are saved as long as the disabilities continue, and five years after, but no longer. A., seised in fee of lands, died, leaving B. his heir, a feme covert. Upon the death of A., a stranger made a tortious entry on the lands, continued in possession, and levied a fine *sur cognizance de droit come ceo, &c.* with proclamations. B. afterwards died under coverture, no entry having been made on her behalf to avoid the fine, leaving C. her heir, not affected with any of the disabilities mentioned in the statute. It was holden, that C., who had not pursued his right within five years after the death of B., was barred by the fine. *Dillon v. Le-man*, 2 H. Bl. 584.

(34) By force of this clause, persons having a present right to lands whereof a fine is levied, and not being parties to such fine, may pursue their claim within five years, to be computed from the day on which the last proclamation was made.

(35) One who had a future interest, but no present right of entry at the time of the fine levied, died, and the five years passed, and afterwards administration was granted; it was holden that the administrator should have five years to sue from the granting of the letters of administration, *for none had title of entry before*. *Sanders v. Stanford*, cited in *Saffyn v. Adams*, Cro. Jac. 61. But where a lease for years of land was made to commence from the end of a term for years then in being; the first term expired, the second lessee did not enter, but the reversioner entered and made a feoffment, and levied a fine with proclamations; five years passed; it was holden, that the fine and the non-claim of the second lessee had barred him of his term; for although lessee for years has not such an estate as will enable him to levy a fine, yet shall his interest be barred by the statute; for the words of the statute are general; (*"the said fine with proclamations shall be a final end, and conclude as well privies as strangers to the same,"*) and the words of the saving are, (*such right, claim, and interest,*) and tenant for term of years has an interest. *Saffyn v. Adams*, 5 Rep. 123. b. Cro. Jac. 60. S. C.

due; and further, if the said persons are under any of the before mentioned disabilities at the time when their right first accrues, they or their heirs may pursue their right within five years next after the removal of the disability. 3d, Saving to every person, not party nor privy to the fine, their exception to avoid the fine, by that, that those which were parties to the fine, nor any person to their use, had nothing in the lands at the time of the fine levied.

Such are the provisions of the statute on which the force and effect of fines, levied at this day, principally depend, and by virtue of which, a fine levied by tenant of the freehold, with five years non-claim, will operate as a bar to an ejectment, except in those cases which are specially provided for by the statute.

A. tenant for life, with remainder to his own executors for forty years, with remainder to B. in fee, levied a fine sur consuance de droit, with proclamations, in Hil. T. 1733-4. B., not having made an entry to avoid the fine, in 1735, devised to C. for life, with remainder to D. in tail, and died in that year; in 1738 A. died; C. died in 1803, not having made an entry; in 1805 D. entered for the purpose of avoiding the fine, and brought ejectment. It was holden, that D. was not entitled to recover; for the right of entry was confined to five years after the expiration of the term for forty years, that is, to five years after 1778; and B. could not by his will give a right to avoid this fine at a more distant period than the end of the five years; that the devisee was exactly in the same state as the heir; and, that as the title of D. did not "first accrue to him after the fine by matter *before* the fine," but by the will of B. which was after the fine, D. could not claim the benefit of the second saving^l.

This statute extends to copyholds^k.

With respect to the clauses relating to disabilities, it may be observed, that if he, who has a present right, and is not under any disability, brings on himself a disability; as if, being within the realm at the time of the fine levied, he should afterwards go beyond sea, or the like; in these cases he will not be allowed any longer time to pursue his right than during the first five years after proclamation had^l. So when the disability is once removed, the five years begin to run, and will continue to run, notwithstanding any subsequent disability, either voluntary or involuntary^m. It will

^l Goodright v. Forester, Exch. Ch.
¹ Taunt. 578.

^k 9 Rep. 105. a.

¹ Shep. Touch. 29.

^m Doe d. Durrour v. Jones, 4 T. R. 300.

be proper to remark also, that the exceptions in favour of infants, *femes covert*, &c. extend to those only to whom a right first accrues, and in whom it first attaches; for if a person to whom a right first accrues, dies before the expiration of the five years, and such right descends to his son, or heir at law, who is then under age, or labours under any of the other disabilities mentioned in the act, such son or heir must pursue his right within the five years, which began to run in the time of his ancestors, otherwise he will be barredⁿ.

A fine levied by tenant for life divests and displaces all estates in reversion or remainder^o, and leaves nothing in the reversioner or remainder man but a mere right of entry (36); and where the fine is levied by tenant for life of parcel of a manor, the reversion of which parcel is in the tenant in fee in possession of the other parts of the manor, the effect of the fine is to sever such parcel from the manor.

Proof of Fine.—The chirograph of a fine is evidence of such fine; because the chirographer is appointed to give out copies of the agreements between the parties, which are lodged of record^p. But where a fine is to be proved with proclamations, an examined copy of the proclamations must be produced in evidence^q; for, although the chirographer is authorised by the common law to make out copies to the parties of *the fine*, yet he is not appointed by the statutes to copy the proclamations, and therefore his endorsement on the back of the fine, that the proclamations have been duly made, will not be sufficient evidence.

Proof of an *actual* entry is necessary to avoid a fine levied with proclamations^r; and this rule holds as well where the fine is levied by tenant for life^s, as in other cases. It must appear also that the ejectment was commenced within a year after such entry^t.

4. *Entry barred by Stat. 21 Jac. 1. c. 16.*—By stat. 21 Jac. 1. c. 16, s. 1. "No person shall make any entry into "any lands, &c. but within twenty years next after his right "or title shall first descend or accrue, and in default there-

ⁿ *Stowell v. Zouch*, Plowd. 355.

^o *Goodright v. Forrester*, 8 East, 552.

^p Bull. N. P. 229.

^q *Chettle v. Pound*, Bull. N. P. 229.

Allen's case, Clayt. 51. S. P.

^r *Berrington v. Parkhurst*, Str. 1086.

^s *Compere v. Hicks*, 7 T. R. 433, 737.

^t Stat. 4 Ann. c. 16. s. 10.

" of, such person so not entering, and his heir, shall be utterly disabled from such entry."

But by s. 2. " If any person having right or title of entry, shall be at the time of the said right or title first descended, accrued, come, or fallen, within the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond seas, then such person and his heir may, notwithstanding the said twenty years be expired, bring his action or make his entry, as he might have done before this act: so as such person or his heir shall, within ten years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death (37), take benefit of and sue forth the same, and at no time after the said ten years (38)."

The plaintiff must prove either actual possession or a right of entry within twenty years, or account for the want of it; for by virtue of this statute, an uninterrupted adverse^a possession for twenty years (except in cases which fall within the clause of exception) operates as a descent or a discontinuance which tolls entry. Hence, the defendant may take advantage of this statute on the general issue.

Where the defendant has the legal title and is in posses-

^a Salk. 421.

(37) " It appears probable enough, upon looking into the case of *Stowell v. Lord Zouch*, Plowd. 355. b. that the word *death* was introduced here to obviate the difficulty, which had arisen in that case, upon the construction of the statute of fines, 4 H. 7. c. 24. for want of that word." Per Lawrence J. in *Doe v. Jesson*, 6 East's R. 85.

(38) This clause gives *to the party*, to whom a right of entry accrues, and who is under a disability at the time, ten years after the disability removed, notwithstanding the twenty years should have elapsed after his title first accrued; and *to the heir*, the statute gives ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability; for the word *death* refers to the death of the person to whom the right first accrued, and whose heir the claimant is*; hence, where the ancestor died seised, leaving a son and daughter, infants, stranger entered, the son died within age; it was holden, that the daughter was entitled only to ten years from the death of her brother, to make her entry.

* *Doe v. Jesson*, 6 East, 80.

sion^x, he may defend himself upon his title, although 20 years have run against him before he took possession, such 20 years possession not being the possession of the lessor of the plaintiff.

This statute runs against the lord of a manor as well as against any other person^y. Hence if a house, &c. be built on the waste, the lord should take care to have some entry made of it in his books and reserve some rent or service; otherwise he will lose his right.

In like manner, if a common has been inclosed 20 years, the commoners' right of entry is gone^z.

It is to be observed, that the right or title of entry within this statute, must be such as is accompanied by a right of possession^a: A., seised in fee of an estate, made a lease for years, containing a clause of re-entry, in default of payment of the rent reserved, and afterwards devised the estate to B. in fee, and died. From the death of A., until the expiration of the lease, (a period of more than twenty years) C., the heir at law of A., received the rent from the lessee; during all which time B., the devisee, did not take any steps to recover the possession; but within twenty years after the expiration of the lease, B. brought an ejectment; whereupon it was objected that B.'s right of entry was barred by this statute: 1st, By the non-receipt of rent by B. under the lease granted by the devisor for more than twenty years, and an adverse enjoyment by C. of such rent during all that time; and, 2dly, By B. not having availed himself, for more than twenty years, of his right of entry under the proviso in the lease for non-payment of the rent. But the court overruled the objection, and held that B. was entitled to recover, observing, that *during the lease*, B. could not have entered and supported the ejectment; and although a forfeiture were committed, yet B. was not obliged to enter.

This statute does not run in any case, except where there is an actual ouster or disseisin^b. Hence, it is proper to consider what acts amount to an ouster or disseisin:

Taking the whole profits by one tenant in common is not any ejectment of the other^c.

x Doe d. Burrough v. Reade, 8 East, 353.

y Greechey v. Preston, Norfolk Summ. Ass. 1728. Ld. Raymond C. J. Serjt. Leeds's MS.

z Creach v. Wilnot, Derby Summ. Ass. 1752. per Lee C. J. Cited by

Lawrence J. in Hawke v. Bacon, 2 Taunt. 160.

a Doe d. Cook v. Danvers, 7 East, 299.

b Per Cur. in Reading v. Royston, Salk. 423.

c 1 Inst. 199. b.

Where one tenant in common had received rent for the whole of the premises^d, and had not accounted for it to his companion for above twenty years, this was holden by the court not to be such an adverse possession as would bar the tenant in common, who had been kept out of the rents, from maintaining an ejectment for an undivided moiety (39). It is to be observed, that in the preceding case it was not left to the jury to presume an actual ouster; consequently no ouster was found, but merely the facts as above stated. But in a case where it appeared^e, that there had been for nearly 40 years sole and uninterrupted possession by one tenant in common, without any claim by his companion to a share of the repts and profits, and without any acknowledgment of his right by the other tenant in common, it was holden to be a sufficient ground for a jury to presume an actual ouster of the co-tenant, and consequently that the statute operated as a bar to a recovery in ejectment (40).

So parceners and joint tenants cannot be disseised by their companions, except by an actual ouster^f.

If there be tenant at sufferance^g, and a stranger, not having any right to the land, make a lease to him by indenture, rendering rent without putting the tenant by sufferance out of possession, and the tenant pay the rent to the stranger, that is not any disseisin to him who has the right.

If a stranger receive of my tenant by voluntary payment^h,

^d Fairclaim v. Shackleton, 5 Burr. g Per Cur. in Penson v. Sone, 1 Roll. 9604. 2 Bl. R. 690. Abr. 659. (C) pl. 11.
^e Doe d. Fisher v. Prosser, Cowp. 217. h 1 Roll. Abr. 659. (C) pl. 8.
^f Hob. 120.

(39) Where one tenant in common enters generally without his companion, it shall work an entry to the companion. Smales v. Dale, Hob. 120. Where one parcener enters generally, and takes the profits, this shall be accounted in law the entry of them both, and not a divestment of the moiety of her sister. 1 Inst. 243. b. See Doe v. Keen, 7 T. R. 386.

(40) "There have been frequent disputes, as to how far the possession of one tenant in common shall be said to be the possession of the other, and what acts of the one shall amount to an actual ouster of his companion. I think the only case in which the possession of one tenant in common can be said to be the possession of the other is, where one holds possession *as such*, and receives the rents and profits on account of *both*. With respect to what acts will amount to an actual ouster, if no actual ouster is proved, yet it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury." Per Aston J. S. C.

without coercion of distress, the rent due to me, that is a disseisin to me at my election.

The possession of one joint tenant is the possession of the other, so as to prevent the operation of the statute^l.

Where two persons are in possession, the possession is judged in him who hath right^k.

A claim or entry, to prevent the operation of the statute must be on the land, unless there be some special reason to the contrary^l.

And by stat. 4 Ann. c. 16. s. 16. An action must be commenced within one year next after the making of the claim or entry and prosecuted with effect; otherwise the claim or entry will be of no avail.

The stat. 21 Jac. c. 16. shall not be taken by construction^m, to bar a man of his action, unless it be expressly found how the possession has been.

If a mortgage is made for a collateral security, although the mortgagee is not in possession for twenty years and more, yet if interest be paid on the bond, the statute shall not barⁿ.

XI. Evidence.

Evidence on the Part of the Lessor of the Plaintiff.—THE evidence required to support an ejectment will vary according to the title of the lessor of the plaintiff.

Devisee of a Term.—Where the lessor of the plaintiff is devisee of a term, he must produce in evidence the probate of the will, and prove the assent of the executor to the devise^o; for where a person devises, either specially or generally, goods or chattels, real or personal, and dies, the devisee cannot take them without the assent of the executors.

Lessee for years devised the term to his executor for life^p, paying 50*l.* to J. S., remainder to the lessor of the plaintiff.

^l Ford v. Grey, Salk. 285. But see ⁿ Per Holt C. J. Ld. Raym. 750.
^o 1 Inst. 111. a.

² Taunt. 441.

^k Hob. 392.

^l Salk. 285.

^m Per Holt C. J. delivering the opinion of the court, Ld. Raym. 259.

^p Young v. Holmes, Str. 70. Middlesex Sittings, B. R. Parker C. J.

The executor dying, his executrix entered upon the residue of the lease and possessed herself of the term. An ejectment having been brought, it was holden, that the executor took as executor, and not as legatee; and then the remainder over was not executed, and that it was incumbent on the remainder man to prove a special assent thereto, as to a legacy; whereupon plaintiff proved payment of the 50*l.*; and that was holden to be a sufficient assent, and the plaintiff recovered.

Administrator.—Where the lessor of the plaintiff claims title as administrator, in strictness he ought to produce the letters of administration under the seal of the ecclesiastical court. But the entry^q, or an examined copy^r of the entry in the book, wherein the orders of the court for granting letters of administration are entered; or an exemplification^s of the letters of administration will also be evidence.

If the lessor of the plaintiff make title as assignee of a term from an administrator^t, *cum testamento annexo*, an exemplification, though not in *hæc verba*, yet agreeably to the form of the ecclesiastical court, will be good evidence (41).

Copyhold.—If the plaintiff make title in the lessor as lord of a manor^u, who has right by forfeiture of a copyhold, he ought to prove that his lessor is lord, and the defendant a copyholder; and that he committed a forfeiture: but the presentment of the forfeiture need not be proved, nor the entry or seizure of the lord for the forfeiture.

Tenant by Elegit.—Tenant by elegit must produce in evidence an examined copy of the judgment, of the writ of elegit taken out upon it, and the inquisition and return thereupon.

Landlord.—In ejectment by a landlord against his tenant, it will not be necessary for the landlord to give any evidence of his title anterior to the lease; for the tenant will not be permitted to impeach the title of the person under whom he came into possession.

q Garrett v. Lister, 1 Lev. 25. Pease-
lie's case. 1 Lev. 101. Elden v.
Kedwell, 8 East. 187.

r Ray v. Clerk, London Sitings, after
H. T. 1775. Ld. Mansfield C. J. 13
East, 239.

s Per Lord Hardwicke C. J. in Kemp-
ton v. Cross, Ca. T. H. 108.

t Kempton v. Cross, Ca. T. H. 108.
u Peters d. Bp. of Winton v. Mills,
per Tracy, Surrey, 1707. Bul. N. P.
107.

(41) For the evidence necessary to establish a title by the heir, see Peake's Evid. part II. chap. xiv. where this subject is treated with great perspicuity. For evidence on ejectment brought by devisee of land, see post tit. Statute of Frauds, s. 3.

In ejectment upon a clause of re-entry^z, in a lease, for non-payment of rent against the assignee of the term, the lessor proved, by the subscribing witness, the execution of the counterpart of the lease; this was ruled to be sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent, without producing the lease itself, or proving that notice had been given to the defendant to produce it (42).

In ejectment for a leasehold estate, the lessor of the plaintiff produced the original lease, which was for a term of 1000 years, granted in the time of Queen Elizabeth; and one mesne assignment in the time of King James, and then proved possession in himself and those under whom he claimed, for 70 years prior to the ejectment; it was holden^y, that the jury might be directed to presume all the mesne assignments.

In ejectment by landlord against tenant^x, the landlord proved payment of rent and half a year's notice to quit. But on the cross examination of the plaintiff's witness, he was asked, whether there was not an agreement in writing relative to the holding of these lands? to which he answered, that an agreement in writing relative to these lands was produced at the last trial of this ejectment (this being the second trial); but he did not know the contents of it: and then another witness was called, who proved that he had seen the same paper in the hands of Sir M. Wood's attorney, on the same morning (i. e. of this trial). Whereupon it was objected on the part of the defendant, that no parol evidence of the tenancy could be given, when it appeared that there was an agreement in writing concerning it; and it did not appear that the landlord had any right to determine the tenancy in the manner he had done. Lord Ellenborough C. J. If there were any writing relative to this holding, in the possession of the landlord, the defendant ought to have given him a regular notice to produce it; otherwise, in this collateral way, he would get the whole benefit of it, without giving such a notice; when, if notice had been given, and the

^x *Roe v. Davis*, 7 East, 363.

^y *Earl d. Goodwin v. Baxter*, 2 Bl. R. 1228.

^z *Doe d. Sir M. Wood v. Morris*, 12 East, 237.

(42) It is sufficient to prove assignment of lease by subscribing witness, without calling the subscribing witness to the original lease. *Nash v. Turner*, 1 Esp. N. P. C. 217. per Kenyon C. J. In this case, the assignment was by endorsement.

paper were produced, it might not support the objection. How can we say that the plaintiff ought to have been nonsuited for want of giving the best evidence of the tenancy, unless it appeared that there was other and better evidence of it in an agreement in writing between the landlord and his tenant, which the landlord kept back? Enough, at least, ought to appear to shew that the paper not produced was better evidence of the terms of the tenancy than the evidence which was received; but it did not appear that it was an agreement between these parties, or that it was an existing agreement at this time: it might have been an agreement between the defendant and his former landlord; or it might have related to a former period of the tenancy. The witness did not profess to know any thing of the contents of the paper, only that it was an agreement relative to the lands in question.

Legitimacy.—In this action, the legitimacy of the parties frequently comes in question. An opinion appears to have prevailed at one time, that unless the husband was *extra quatuor maria*, that is, out of the kingdom, during all the time of the wife's going with child, access must be presumed, and the child must be deemed legitimate^a. But, on examination of this doctrine, it was found unsatisfactory, and it is now holden^b, that non-access may be proved to bastardize the issue, although it should appear, that the husband was within the kingdom during the period of gestation. So where the husband, in the course of nature, cannot have been the father of his wife's child, the child is by law a bastard, whether the husband be within reach of access or not; as in the case of a natural impossibility, the husband being within the age of puberty^b; or disabled by bodily infirmity^c. So where it was proved, that the husband had not access, until a fortnight before the birth of the child, the child was adjudged^d to be illegitimate. The wife is a witness of necessity, as to the fact of adulterous intercourse, because that lies within her own knowledge^e, and she is the only person who may be supposed privy to it, except the adulterer. This case, therefore, affords an exception to the general rule, which prohibits the wife from being examined against her husband in any matter affecting his interest or character. But *non-access* must be proved by other testi-

^a Queen v. Murrey, Salk. 122.

^b Pendrell v. Pendrell, Str. 905. R.

v. Bedall, Str. 1076. Rep. Temp.

Hardw. 379. and Andr. 9.

^b 1 H. 6. s. b.

^c 1 Rol. Abr. 359. cited by Ld. Ellenborough, 8 East, 205.

^d R. v. Luffe, 8 East, 193.

^e R. v. Reading, Rep. Temp. Hard. 79. R. v. Rooke, 1 Wils. 240. and Andr. 10.

mony^f than that of the wife, and this rule holds although the husband be dead^g.

The presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunity of access to each other during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption^h.

The fact of the birth of a child from a woman united to a man by lawful wedlock, is generally, by the law of England, *prima facie* evidence, that such child is legitimateⁱ. Such *prima facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and wife, as by the laws of nature is necessary, in order for the man to be in fact the father of the child^k. The physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved^l.

After proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which is to be understood proof of sexual intercourse between them) no evidence can be received, except it tend to falsify the proof that such intercourse had taken place^m. Such proof must be regulated by the same principles as are applicable to the establishment of any other factⁿ.

In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child^o.

The presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife

^f R. v. Reading, Rep. Temp. Hard. 79. ⁱ Banbury Claim of Peerage, D. P.
^g R. v. Rooke, 1 Wils. 340. and Andr. ^j Opinion of the judges, 13 May, 1811.
^h 10. ^k Ib.
ⁱ R. v. Kea, 11 East, 132. ^l Ib.
^j Banbury Claim of Peerage, D. P. ^m Ib.
^k 2 May, 1811. Opinion of the judges. ⁿ Ib.
^l Ib. S. C. 4 July, 1811.

by a sentence of divorce, can be legally resisted only by evidence of such facts or circumstances, as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife at any time, when by such intercourse the husband could, by the laws of nature, be the father of such child^p.

Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child; and the evidence to prove that he was not the father, must be of such facts and circumstances, as are sufficient to prove to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child^q (43).

Mortgagee.—In ejectment by a mortgagee, if the mortgagor be in possession^r, proof of the execution of the mortgage deeds by the subscribing witness, will be sufficient to support the mortgagee's title; but if a third person is in possession, the mortgagee should also prove, that such third person has paid rent to, or otherwise acknowledged the title of the mortgagor.

Rector.—In ejectment by a rector for a rectory^s, it seems that it is not necessary for the plaintiff to prove that he subscribed and publicly read the thirty-nine articles; for where any act is required to be done, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary on the other side^t.

^p Opinion of the judges, S. C. 4 July, 1811.

^q *Ib*.

^r Peake's Evid. 324.

^s See *Monk v. Butler*, 1 Roll. Rep. 83. recognised in *Powell v. Milbank*,

2 Bl. R. 853. See also *Williams v. East India Company*, 3 East, R. 199.

^t *Sherrard's case*, cited by de Grey C. J. delivering the opinion of the court in *Powell v. Milbank*, 2 Bl. R. 853.

(43) "The non-existence of sexual intercourse, is generally expressed by the words "non-access, of the husband to the wife." And we understand those expressions as applied to the present question as meaning the same thing; because in one sense of the word "access," the husband may be said to have access to his wife as being in *the same place*, or in *the same house*, and yet under circumstances such as instead of proving, tend to disprove, that any sexual intercourse had taken place between them." Remark of the judges.

Hence where a prebendary brought ejectment for a house, belonging to his prebend, and was required to shew that he had performed the requisites necessary by law to make him prebendary; Wilmot J. held, that it ought to be presumed that he had performed them, until something appeared to the contrary.

In addition to the proof of his title, the lessor of the plaintiff must, if the landlord be made defendant, prove his tenant or tenants in possession of the lands, &c. to which plaintiff makes title^a; or if the *tenant*^x or tenants in possession defend, the lessor of the plaintiff must prove *him* or them in possession of the lands, &c. to which he makes title.

N. A tenant in possession cannot be a witness to support his own possession^y.

If a material witness for the defendant be made a co-defendant, he should suffer judgment by default (44).

The parish register, or an examined copy thereof, will be evidence to prove christenings, marriages, or burials.

The original visitation books of heralds^z, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents, as were verified to them on oath, are allowed to be good evidence of pedigrees.

Although it is a general rule that hearsay evidence is not admissible, yet in some cases where a strict adherence to that rule would utterly prevent the party from establishing his case, the law sanctions a departure from it (45). Hence,

^a Smith v. Mann, 1 Wils. 320. Fenn y Doe d. Foster v. Williams, Cowp. 621.
^d Blanchard v. Wood, 1 Bos. & Pal. 573.

^x Goodright v. Rich, 7 T. R. 327. in which Doe d. Jesse v. Bacchus, Bul. N. P. 110. was overruled.
^z Matthew v. Port, Comb. 63. 3 Bl. Comm. c. 7. 11.

(44) One of two defendants, who has suffered judgment by default, may be called to prove the other defendant in possession. Doe d. Harrop v. Green, 4 Esp. N. P. C. 198. *sed quæ.* and see Chapman v. Graves, 2 Camp. N. P. C. 333. n.

(45) "Hearsay is good evidence to prove, who is my grandfather, when he married; what children he had, &c. of which it is not reasonable to presume that I have better evidence; so to prove that my father, mother, cousin, or other relation beyond the sea is dead, and the common reputation and belief of it in the family, gives credit to such evidence." Gibb. L. Ev. 112. edit. 1761.

the declarations of the members of a family, and, perhaps, of others living in habits of intimacy with them (46), are received in evidence as to pedigrees^a; but evidence of what a mere stranger has said has ever been rejected in such cases.

The husband has been considered as a member of the wife's family within this exception^b; and, consequently, evidence of his declarations as to the illegitimacy of his wife is admissible.

In the case of the Banbury claim of peerage, D. P. 23d February, 1809, the counsel for the petitioner stated that he would offer in evidence certain depositions taken upon a bill (seeking relief), filed in the Court of Chancery on the 9th of February, 1640, by Edward, the eldest son of the first Earl of Banbury, an infant, by his next friend. This evidence having been objected to, and the point argued, the following questions were proposed to the judges:

Upon the trial of an ejectment brought by E. F. against G. H., to recover the possession of an estate, E. F., to prove that C. D., from whom E. F. was descended, was the legitimate son of A. B., offered in evidence a bill in chancery, purporting to have been filed by C. D. 150 years before that time by his next friend, such next friend therein stiling himself the uncle of the infant for the purpose of perpetuating testimony of the fact that C. D. was the legitimate son of A. B., and which bill stated him to be such legitimate son (but no persons claiming to be heirs at law of A. B., if C. D. was illegitimate, were parties to the suit, the only defendant being a person alleged to have held lands under a lease from A. B., reserving rent to A. B. and his heirs): and also offered in evidence depositions taken in the said cause; some of them purporting to be made by persons stiling themselves relations of A. B.; others stiling themselves servants in his family; others stiling themselves to be medical persons attendant upon the family: and in their respective depositions stating facts, and declaring that C. D. was the legitimate son of A. B., and that he was in the family, of which they were

^a Per Lord Kenyon C. J. in *R. v. Eriswell*, 3 T. R. 793.

^b *Vowles v. Young*, 13 Ves. 140. *Ld. Erskine C.*

(46) In ejectment between the Duke of Athol and *Ld. Ashburnham*, E. 14 Geo. 2. Mr. Sharpe, who was attorney in the cause, was admitted to prove what Mr. Worthington (who happened to die before the trial) had told him he knew and had heard in regard to the pedigree of the family. *Gilb. L. Ev.* 112.

respectively relations, servants, and medical attendants, reputed so to be.

1st question. Are the bill in equity, and the depositions respectively, or any, and which of them, to be received in the courts below, upon the trial of such ejectment (G. H. not claiming or deriving, in any manner, under either the plaintiff or defendant in the said chancery suit), either as evidence of facts therein [alleged, denied, or] deposed to, or *as declarations respecting pedigree*; and are they, or any, and which of them, evidence to be received in the said cause, that the parties filing the bill, and making the depositions, respectively sustained the characters of uncle, relations, servants, and medical persons, which they describe themselves therein sustaining.

Answer (47). Neither the bill in equity, nor the depositions, are to be received in evidence in the courts below, on the trial of the ejectment, either as evidence of the facts therein [alleged, denied, or] deposed to, or *as declarations respecting pedigree*; neither are any of them evidence that the parties filing the bill, or making the depositions respectively sustained the characters of uncle, relations, servants, and medical persons, which they describe themselves therein sustaining. The judges further added, that it would not make any difference in their opinion, if the bill, stated to have been filed by C. D., by his next friend, had been a bill seeking relief.

2nd question. Whether any bill in chancery can ever be received as evidence in a court of law, to prove any facts either alleged or denied in such bill?

Answer. Generally speaking, a bill in chancery cannot be received as evidence, in a court of law, to prove any fact either alleged or denied in such bill. But whether any possible case might be put which would form an exception to such general rule, the judges could not undertake to say.

3rd question. Whether depositions, taken in the Court of Chancery, in consequence of a bill to perpetuate the testimony of witnesses, or otherwise, would be received in evidence to prove the facts sworn to, in the same way and to the same extent as if the same were sworn to at the trial of an ejectment by witnesses then produced?

Answer. Such depositions would not be received in

(47) The C. J. of C. B. delivered the opinion of the judges on the 30th May, 1809.

evidence, in a court of law, in any cause in which the parties were not the same as in the cause in the Court of Chancery, or did not claim under some or one of such parties.

If the question be, whether a certain manor be ancient demesne or not, the trial shall be by Domesday Book, which will be inspected by the court^e.

In ejectment for the manor of Artam^d, the defendant pleaded ancient demesne, and when Domesday Book was brought into court, would have proved, that it was anciently called Nettam, and that Nettam appears by the book to be ancient demesne; but he was not permitted to give such evidence; for if the name be varied, it ought to have been averred on the record.

An ancient writing found among the court rolls of a manor, stated to be *ex assensu omnium tenentium*, and proved to have been delivered down from steward to steward, is admissible evidence, although not signed by any person, to prove the course of descent within the manor^e.—And the same rule holds, with respect to an entry in the court rolls of a presentment made by the homage of the customary mode of descent within the manor, although no instances be proved of any person having taken according to the mode of descent pointed out in the presentment^f.

Custom is of the very essence of a copyhold; and if the custom be silent, the common law must regulate the course of descent.—Customs are to be taken strictly and cannot be extended by implication.—Hence where the custom is, that the eldest sister shall inherit, yet by that custom the eldest aunt or the eldest niece shall not inherit the land^g. So if the custom be that the *youngest son* shall inherit, and a man has issue two sons and dies, and the land descends to the younger son, who dies without issue, the *eldest son* of the *eldest brother* shall have the land; because the custom does not hold in the transversal line, but, only in the lineal descent^h.

Evidence of reputation of the custom of a manorⁱ, that, in default of sons, the *eldest daughter*, and, in default also of daughters, the *eldest sister*, and in case of the death of all, the *descendants* of the eldest daughter or sister respectively of the person last seised should take, is proper to be

^e Hob. 188.

^d Gregory v. Withers, H. 23 Car. 2.

Gillb. Ev. 44. 3 Keb. 588. S. C.

^e Denn d. Goodwin v. Spray, 1 T. R. 466.

^f Roe d. Beebee v. Parker, 5 T. R. 26.

^g Ratcliff v. Chapman, 4 Leon. 242.

^h 1 Rol. Abr. 624. pl. 2.

ⁱ Doe d. Foster and another v. Sisson, 12 East, 62.

left to the jury of the existence of such a custom, as applied to a *great nephew* (the grandson of an eldest sister) of the person last seised; although the instances in which it was proved to have been put in use extended no farther than those of eldest daughter and eldest sister, and the son of an eldest sister. The existence of such extended custom in adjacent manors seems to be no evidence of the custom in the particular manor.

The premises were laid in the declaration to be in the parish of Farnham, and at the trial were proved to be in the parish of Farnham Royal; but it was not shewn by the defendant that there were two Farnhams. The variance was holden to be immaterial^k.

Evidence on the part of the Defendant.—If the defendant prove a title out of the lessor of the plaintiff, it is sufficient, though he have not any title himself; but he ought to prove a subsisting title out of the lessor, for producing an ancient lease for 1000 years will not be sufficient, unless he likewise prove possession, under such lease, within twenty years^l. So if the defendant produce a mortgage deed, where the interest has not been paid, and the mortgagee never entered, it will not be sufficient to defeat the lessor, who claims under the mortgagor^m; because it will be presumed, that the money was paid at the day, and, consequently, that it is not a subsisting title; but if the defendant prove interest paid upon such mortgage after the time of redemption, and within twenty years, it will be sufficient to nonsuit the plaintiff.

The defendant produced a mortgage for yearsⁿ, by deed, from the plaintiff's ancestor, upon which was an endorsement in *hæc verba*, "Received of M. O. 500*l*. on the " within recited mortgage, and all interest due to this day; " and I do hereby release to the said M. O., and discharge " the mortgaged premises from the said term of 500 years." On a case reserved, the court held, 1st, that these words amounted to a surrender of the term; 2d, that such surrender might be by note in writing, without deed, by the statute of frauds (29 Car. 2. c. 3. s. 3.); 3d, that a note in writing was not required to be stamped (48).

^k Doe d. Tollet v. Salter, 13 East, 9.

^l Bull. N. P. 110.

^m Wilson v. Witherby, per Holt, C. J.

Bull. N. P. 110.

ⁿ Farmer d. Earle v. Rogers and another, T. 1755. C. B. Bull. N. P. 110.

² Wils. 26. S. C.

(48) So in Hodges v. Drakeford, 1 Bos. & Pul. N. R. 270. it was holden, that an assignment in writing, not under seal, endorsed

what he demands. If the plaintiff take out execution for more than the recovery warrants^u, the court will interpose in a summary way, and restore the tenant to the possession of such part as was not recovered.

If the execution be for twenty acres^x, the sheriff must give possession of twenty acres, according to the estimation of the county where the lands lie.

It is at the election of the plaintiff whether the sheriff shall return the writ of *hab. fac. pos.* or not^y. The court will not oblige the sheriff to return it, except at the instance of the plaintiff. But after possession has been given under the writ^z, the plaintiff cannot sue out another writ, although he be disturbed by the same defendant, and though the sheriff have not returned the former writ; for an alias cannot issue after a writ is executed; if it could, the plaintiff, by omitting to call on the sheriff to make his return to the writ, might retain the right of suing out a new *habere facias possessionem*, as a remedy for any trespass which the same tenant might commit within twenty years next after the date of the judgment.

XIII. Writ of Error.

By stat. 16 & 17 Car. 2. c. 8. s. 3. it is enacted, that "No execution shall be staid by writ of error upon any judgment, *after verdict* in *ejectio firmæ*, unless the plaintiff, in error, shall become bound in such reasonable sum as the court of error shall think fit, to pay the plaintiff in ejectment, all such costs, damages, and sums of money, as shall be awarded upon, or after such judgment affirmed, discontinuance, or nonsuit had."

Although the words of the statute seem to require a recognizance *by the plaintiff in error himself*^a, yet it has been holden, that the intention of the legislature will be satisfied by plaintiffs in error procuring responsible persons to enter into the obligation required.

u 1 Burr. 629. 2 Burr. 2673. Doe d. y Palm, 289.
Saul v. Dawson, C. B. 3 Wils. 49. z Doe d. Pate v. Roe, 1 Taunton's R.
x 1 Rol. Rep. 420. 1 Rol. Abr. 386. 55.
(H.) pl. 4. a Keene v. Deardon, 8 East, 298.

By another clause^b of the same statute, "in case of affirmance, discontinuance, or nonsuit, the courts are to issue a writ to inquire as well of the mesne profits, as of the damages, by any waste committed, after the first judgment; and are thereupon to give judgment, and award execution for the same, and also for costs of suit."

XIV. *In what Cases a Court of Equity will restrain the Party from bringing further Ejectments, by granting a perpetual Injunction.*

WHERE several verdicts had been obtained in ejectment, upon the same title, to the satisfaction of the court, a perpetual injunction was granted, in the case of Earl of Bath, infant, and others, v. Sherwin and others, D. P. 17th January, 1709^c, reversing the decree of Lord Chancellor Cowper. N. Lord Cowper and Lord Sommers were present in the House of Lords when this decree was reversed.

After this reversal of Lord Cowper's decree, it was usual to grant perpetual injunctions under the like circumstances, as was said by Baron Price, in the case of Barefoot v. Fry, in the Court of Exchequer. The case of Barefoot v. Fry^d was determined by Eyre C. B. and Price, Page, and Gilbert, barons, on the 20th of February, 1723, in Serjeant's Inn Hall, on a bill filed for a perpetual injunction to restrain defendant, Fry, from any further proceeding in ejectment, and to quiet plaintiff in his possession. The defendant, having brought five ejectments, had been non-suited upon full evidence in three, and verdicts found for the lessor of the plaintiff in the other two. A perpetual injunction was granted, although it was said by Mr. Ward (defendant's counsel), that courts of equity did not decree perpetual injunctions upon ejectments, and only upon an issue directed. Eyre C. B. observed, that real actions could not be brought twice for the same thing, but now ejectments having been introduced in the place of real actions, a party might bring as many ejectments as he should think fit; and this was a reason, why courts of equity should settle and quiet the rights of parties.

^b S. 1.

^c This case was recognized in Leighton v. Do. M. 7 G. Str. 404 affirmed D. P. 3d March, 1720. 2 Bro. P. C.

217. Journals H. of Lords, vol. 21. fo. 455.

^d Bunb. 158. pl. 229.

In *Harwood v. Rolph*, after three verdicts in ejectment, another ejectment was brought, in 1772, upon which a special verdict was found and argued in C. B. in Easter and Trinity Terms, 1773; and in Hil. T. 1774, judgment was given for the lessor of the plaintiff (3 Wils. 497. 2 Bl. 937. S. C. and upon error brought in the Court of King's Bench, the cause was argued there in Trinity and Michaelmas term, 1774, and the judgment of the court of C. B. was reversed (see Cowp. 87.); whereupon the lessors of the plaintiff brought a writ of error in parliament, and on the 9th May, 1775, the judgment of the court of B. R. was affirmed. Upon a bill filed in the Court of Chancery, a motion was made for a perpetual injunction, to restrain defendants from any further proceeding in ejectment, which was finally heard before Ld. Bathurst Ch. assisted by Sir Thomas Sewell M. R. on the 13th June, 1776, when an order was made for a perpetual injunction.

XV. *Of the Action of Trespass for Mesne Profits.*

ALTHOUGH the judgment in ejectment is for the recovery of damages, as well as of the term, yet, from the nature of the declaration in that action, such damages are necessarily confined to a compensation for the injury sustained by the ejectment, which being fictitious, the damages must of course be nominal. For the real injury sustained by the plaintiff, viz. the perception of the mesne profits by the tenant in possession, the law has provided another remedy, namely, by an action of trespass, *vi et armis*, which may be brought by the lessor of the plaintiff in ejectment, either in his own name, or in the name of the fictitious lessee (49); and in which the plaintiff may declare, not only for the loss of the mesne profits, but also for the costs of the ejectment, where the case requires it, as after judgment in ejectment by default against the casual ejector.

It was formerly doubted, whether an action for mesne profits could be brought, in the name of the fictitious lessee

(49) Where the action is brought in the name of the fictitious lessee, the court will, upon application, stay the proceedings, until security is given for answering the costs. Bull. N. P. 89.

or nominal plaintiff in ejectment, *after a judgment by default* against the casual ejector: but in the case of *Aslin v. Parkin*, 2 Burr. 665. *Barnes*, 472. 4to edit. S. C. it was determined, that it might be so brought, as well as after a judgment upon a verdict.

The action for mesne profits may be brought by one tenant in common, who has recovered in an action of ejectment by default, against his companion*.

Evidence.—The evidence necessary to support this action (after judgment, upon a verdict in ejectment against the tenant in possession, who has appeared and confessed lease, entry, and ouster) is as follows: an examined copy of the judgment in ejectment, and of the rule of court to confess lease, entry, and ouster (50), proof of the length of time during which the defendant has occupied, and of the value of the mesne profits, and of the costs of executing the writ of possession.

Where the judgment in ejectment has been by default against the casual ejector, and so no rule for the confession of lease, entry, and ouster, the plaintiff, in the action for mesne profits, ought to be prepared with an examined copy, not only of the judgment, but of the writ of possession also; and the return of execution thereon, and proof of the costs in the ejectment, and in executing the writ of possession: proof of the value of the mesne profits will be required in this case as in the former.

c *Goodtitle v. Tombs*, 3 Wils. 118.

(50) "Where the judgment is had against the *tenant in possession*, and the action of trespass brought against him, it seems sufficient to produce the judgment without proving the writ of possession executed, because by entering into the rule to confess, the defendant is estopped both as to the lessor and the lessee, so that either may maintain trespass without proving an actual entry; but where the judgment is had against the *casual ejector*; and so no rule entered into, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed." *Thorp v. Fry*, coram Blencowe J. 11 W. 3. MSS. Bull. N. P. 87. *Northeron v. Bowler*, at Exon. Ass. *Button v. Box*, coram Abney J. Oxford Summ. Ass. 1742. S. P. Notwithstanding the distinction taken in the preceding case, it may be prudent, in general, to be prepared with an examined copy of the writ of possession and return of execution. But N. If the plaintiff has been let into possession by the defendant, that will supersede the necessity of proving that the writ of possession has been executed. Per *Ellenborough C. J.* in *Calvert v. Horsfall*, 4 Esp. N. P. C. 167.

The judgment in ejectment will be conclusive evidence against the tenant in possession of the plaintiff's title, from the day of demise laid in the declaration in ejectment; consequently in the action for mesne profits, it is not necessary for the plaintiff to be prepared with proof of title, except where he seeks to recover profits antecedent to the day of the demise (51), or brings his action against a precedent occupier^f (52).

The general issue in this action is, Not guilty.

If the plaintiff declares against the defendant, for having taken the mesne profits for a longer period of time than six years, before action brought, the defendant may plead the statute of limitations, viz. not guilty within six years before the commencement of the suit, and thereby protect himself from all but six years.

This action being for the recovery of damages^g, which are uncertain, the bankruptcy of the defendant cannot be pleaded in bar.

A judgment, recovered in ejectment against the wife^h, cannot be given in evidence in an action against the husband and wife, for the mesne profits.

If the plaintiff recover less than forty shillings damagesⁱ, and the judge does not certify that the title came in question, the plaintiff will not be entitled to any more costs than damages.

^f Decosta v. Atkins, Bull. N. P. 87.
^g Goodtitle v. North, Doug. 583.

^h Denn v. White and wife, 7 T. R. 112.
ⁱ Doe v. Davies, 6 T. R. 593.

(51) These profits are seldom the object of litigation, because the demise and ouster, in ejectment, are generally laid soon after the time when lessor's title accrued, Run. Eject. 438. N. Where an entry has been made to avoid a fine, the party so avoiding the fine cannot lay his demise in ejectment, or recover the profits that accrued, before such entry. Compere v. Hicks, 7 T. R. 727.

(52) In these cases the action should be brought in the name of the lessor of the plaintiff.

C H A P. XIX.

EXECUTORS AND ADMINISTRATORS.

- I. *Of Bona Notabilia.*
- II. *Of the Nature of the Interest of an Executor or Administrator in the Estate of the Deceased. In what Cases it is transmissible; and where an Administration de bonis non is necessary.*
- III. *Of limited or temporary Administrations.*
- IV. *Of an Executor de son Tort.*
- V. *Of the Disposition of the Estate of the Deceased; and of the Order in which such Disposition ought to be made.*
- VI. *Of Admission of Assets.*
- VII. *Of Actions by Executors and Administrators.*
- VIII. *Of Actions against Executors and Administrators.*
- IX. *Of the Pleadings; and herein of the Right of Retainer—Evidence—Costs—Judgment.*

I. *Of Bona Notabilia.*

BY the 92d canon, (1) "If a testator or intestate dies in
" one diocese, and has, at the time of his death, goods or

(1) This and the following will be found among the canons made by the clergy in a convocation, holden in the first year of the reign of King James the First, A. D. 1603. They received the royal assent, *but were not confirmed by parliament.* Hence it was holden in *Middleton v. Crofts*, Str. 1056. that the canons of 1603 did not *proprio vigore* bind the laity.

"good debts to the value of five pounds, in any other diocese or peculiar jurisdiction, within the same province, the probate of the will, or granting letters of administration, belongs to the prerogative court of the archbishop of that province; and every probate or administration, not so granted, is declared void; with this proviso, that if any man die, *in itinere*, the goods he has about him at that time shall not cause his will or administration to be liable to the prerogative court."

And by the 93d canon, "goods in different dioceses, unless of the value of five pounds, shall not be accounted *bona notabilia* (2);" with this proviso, "that this shall not prejudice those dioceses, where, by custom or composition, *bona notabilia* are rated at a greater sum."

Where there are *bona notabilia*^a, in one diocese of Canterbury and one of York, the bishop of each diocese must grant an administration.

Where in two dioceses of Canterbury^b, and two of York, there must be two prerogative administrations.

It appears from the 92d canon, before stated, that if an ordinary of a diocese commits administration, when the party has *bona notabilia* in different dioceses, such administration is merely void; and it was so decided according to Moor, 145. in 19 Eliz. (3).

^a Burston v. Ridley, Salk. 29.

^b Per Cur. ib.

(2) "It seems, that this canon has changed the law, if that were otherwise before, inasmuch as the granting of administration belongs to the ecclesiastical law, and our law only takes notice of their law in this; and therefore they may alter it at their pleasure." 1 Rolle's Abr. 909. Executors, (1.) pl. 5. But see the preceding note.

(3) The name of the case is not mentioned in Moor; but there is a case in 2 Leon. 155. by the name of Dunne's case of this year, and on this point; from which it appears, that the court were divided in opinion: But Sir Edward Coke, in 5 Rep. 30. a. lays down the position agreeably with the decision mentioned in Moore; and Holt C. J. in Blackborough v. Davis, Salk. 98. speaking of an administration granted to a wrong person, says, "It is not void, as where administration is granted in a wrong diocese, but only voidable." So Weston, Baron, in Bull. N. P. 141. "Where administration is granted in a wrong diocese it is void: where to a wrong person voidable." So per Lord Macclesfield Ch. in Comber's case, 1 P. Wms. 767, 768. (where a question arose upon the validity of a probate granted by the archdeacon of Surrey,

But where A^c. had goods only in one inferior diocese, and the metropolitan of the same province, pretending that he had *bona notabilia* in several dioceses, granted administration; it was adjudged, that the administration was only voidable by sentence, and the reason assigned for this in 5 Rep. 29. b. (where this cause is cited) is, that the metropolitan has jurisdiction over all the dioceses within his province.

Goods of the value of five pounds in one diocese^d, and a lease for years of the same value in another diocese of the same province, though a chattel real, make *bona notabilia*, and require a prerogative administration.

Judgments are *bona notabilia* at the place where they are recorded^e.

Debts by specialty are *bona notabilia* not at the place where the securities were made^f, nor where the testator or intestate died^g, but at the place where the securities are at the death of the testator or intestate.

Hence if a man becomes bound in an obligation in London^h, and dies intestate in Devon, and there hath the obligation at the time of his death, administration ought to be granted by the bishop of Exon, where the obligation was at his death, and not by the bishop of London, where the obligation was made; for the debt shall be accounted goods

c Vere Jefferies, Moor, 145. Nedham's case, 8 Rep. 135. a. S. P. agreed.

d 1 Rol. Abr. 909. (H) pl. 1.

e Adams v. Savage, Ld. Raym. 855. agreed in Gold v. Strode, Carth. 149. Boon v. Hayman, E. 6 G. 2. B. R. MSS. S. P. Anon. 3 Mod. 244.

f Lunn v. Dodson, post.

g Byron v. Byron, Cro. Eliz. (472).

h Lunn v. Dodson, adjudged in an action brought by administrator in London, supposing the obligation to be there made, and shewed the administration to be granted by bishop of Exeter; and on demurrer to declaration, judgment for plaintiff. Affirmed on error, M. 15 Car. 1 Rol. Abr. 908. (G) pl. 4.

the testator having died possessed of *bona notabilia* in two dioceses within the province of Canterbury,) "if this had been an *administration* granted by the archdeacon or ordinary, where there were *bona notabilia* in divers dioceses, the administration had been merely void; for the administrator receives his right entirely from the administration; but the right of the executor is derived from the will, and not the probate, as appears from an executor's having power to release or assign any part of the personal estate before probate; and a defendant at law cannot plead to any action brought by an executor, that the plaintiff has not proved the will, though it is true he may demur, if the plaintiff does not in his declaration shew the probate."

as to the granting the administration, where the deed was at his death, and not where it was made.

But simple contract debts, as debts due on bills of exchange¹, &c. follow the person of the debtor, and the will must be proved, or administration granted in that place where the debtor resided, at the time of the death of the testator or intestate.

In *indebitatus assumpsit* by an administrator², for goods sold and delivered by the intestate, on an administration committed by the archdeacon of Berkshire, the defendant pleaded in bar, that he, the defendant, at the time of the death of the intestate, was an inhabitant and resident in the city of Oxford, which was within the diocese of Oxford, and that the archdeaconry and whole county of Berks were within the diocese of Salisbury. On special demurrer, because it did not appear that the defendant was not an inhabitant within the diocese of Salisbury, the court overruled the demurrer, and adjudged the plea to be good (4).

In debt by an administrator¹, it appeared that the letters of administration were granted by the bishop of Bristol. Plea, that the plaintiff's intestate died on the high sea out of the jurisdiction of the bishop of Bristol, and that therefore the letters of administration were void. On demurrer, it was holden, that the letters of administration were good; for the right of granting them is not founded upon the dying of an intestate within a diocese, but upon his leaving goods therein.

By stat. 37 Geo. 3. c. 90. s. 10. "Persons administering

¹ Yeomans v. Bradshaw, Carth. 373, 4. ¹ Griffith v. Griffith, Say. R. 83.

² Hillyard v. Cox, Salk. 37.

(4) There is evidently a mistake in Salkeld's report of this case*. The pleadings are stated in the text as they appeared on the record, a copy of which will be found at the end of Salkeld's Reports, p. 747. See also this case *ex relatione* M^ri Jacob, Ld. Raym. 562. where it is said, that Northey took exception to the plea, because the defendant did not traverse his residence in Berks within the peculiar. Holt C. J. "If the debtor has two houses, in several dioceses, and at the time of the death of the debtor and commission of administration, is inhabitant and resident at one of the houses, that will exclude the jurisdiction of the ordinary of the diocese, in which the other house stood." Judgment for defendant.

* See Griffith v. Griffith, Say. R. 83. where this mistake is noticed by Lee C. J.

“ personal estates, without proving the will of the deceased,
 “ or taking out letters of administration within six calendar
 “ months after the death, shall forfeit the sum of 50*l*.

II. *Of the Nature of the Interest of an Executor or Administrator in the Estate of the deceased—In what Cases it is transmissible; and where an Administration de bonis non is necessary.*

EXECUTORS or administrators so entirely represent the personal estate of the testator or intestate^m, that they are liable to the payment of all debts, covenants, &c. of the deceased, as far as the assets which have come to their hands will extend to pay (5).

The executorsⁿ more actually represent the person of the testator, than the heir does the person of the ancestor; for if a man bind himself, his executors are bound though they are not named; but the heir is not bound, unless he be expressly named.

Executors may release^{*}, or take a release^{*}, before probate (6), if they prove afterwards. So executors may commence

m 1 Inst. 209. a. b.
 n 1 Inst. 292. b.

q 1 Inst. 209. a.
 p 1 Rol. Abr. 917. (A) pl. 1. Plowd.
 281. a. S. P.

(5) “ It is a maxim and principle, that an executor, where no default is in him, shall not be bound to pay more for his testator than his goods amount unto.” Went. Off. Exe. c. 12.

(6) Before probate and before any seizure, the law adjudges the property of the goods of the testator in the executors. Hence if any person takes the goods of the testator before the executors have seized them, the executors shall have an action of trespass^{*} or replevin; by Walsh J. and Dyer C. J. Plowd. 281. a. So if a man die possessed of goods, and a stranger takes and converts them to his own use, and afterwards administration is granted to J. S.; this administration shall relate to the death of the testator, so that J. S. may maintain trover for the conversion before administration granted to him. 2 Roll. Abr. 399. (A) pl. 1.

* 2 Inst. 398.

an action before probate^q, and it is sufficient if at the time of declaring they produce in court the letters testamentary (7).

Each executor has the entire control of the personal estate of the testator, may release, or pay a debt, or transfer any part of the testator's property, without the concurrence of the other executor^r. And it seems, that the same rule holds with respect to administrators^s (8).

If two have a lease for years as executors, and one sells the whole, this shall bind the other; and the whole shall pass; for each had the entire power of disposing of the whole, both being possessed in the right of their testator^t.

So if one dispose of all the goods of the testator without the other^u.

As an executor is not entitled in his own right, but in

q 1 Rol. Abr. 997. (A) pl. 2.

r Per Sir J. Strange, M. R. 2 Ves. 267.

s Willand v. Fenn, see note (8.)

t Pannel v. Fenn, 1 Rol. Abr. 924. (O)

pl. 1. Gouldsb. 185. S. C.

u Dyer, 23. b. in marg.

(7) So where an executor, before probate, files a bill in a court of equity, and afterward proves the will, such subsequent probate makes the will good. Per Talbot C. 3 P. Wms. 351. So where plaintiffs, after bill filed, took out letters of administration, and charged the same by way of amendment to the bill, having obtained an order for such amendment, it was holden good; for the letters of administration, when granted, relate to the time of the death of the intestate. *Humphreys v. Humphreys*, 3 P. Wms. 351.

(8) In *Willand v. Fenn*, E. 11 G. 2. B. R. MSS. a question arose, whether the release of one administrator would bind his companion? The case was argued in E. 11 G. 2. when the court, entertaining doubts, directed a second argument. The second argument was heard Trin. 11 & 12 G. 2. when Lee C. J. expressed a strong opinion in favour of the affirmative, observing, that it was extremely difficult to form a distinction between executors and administrators upon any reasonable foundation; and that although it had not ever been determined at law, that the administration survived, yet having been so determined in equity, in *Adams v. Buckland*, 2 Vern. 514. and by Lord Talbot in the case of *Hudson v. Hudson*, he thought those authorities were so strong, that they ought not to be departed from. The other judges were inclined to the same opinion, but as the case was new, and of general consequence, they ordered it to be argued again. According to Sir J. Strange M. R. in *Jacomb v. Harwood*, 2 Ves. 267. the case was decided in the affirmative after the third argument; but, from a MS. note in my possession, it appears to have been compromised before the third argument took place.

*auter droit*², to the property of the deceased, the goods of a testator, in the hands of his executor, cannot be seized in execution for the proper debt of the executor (9). But if an executrix use the goods of her testator as her own, and afterwards marry, and then the goods are treated as the goods of the husband, they may be taken in execution for the husband's debt³. Executors and administrators have a joint interest in the estate of the deceased. Hence, if there are two or more executors⁴ or administrators⁵, and one or more of them die, the administration of the estate of the deceased belongs to the survivor or survivors; and it seems, that an action may be brought by a surviving administrator without procuring a new grant of letters of administration⁶.

A probate, as long as it remains unrepealed⁴, cannot be impeached in the temporal courts. Hence, payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate; although the probate be afterwards declared null, and administration be granted to the intestate's next of kin; for the law will not compel a person to pay a sum of money a second time, which he has once paid under the sanction of a court having competent jurisdiction (10).

In an action of *indebitatus assumpsit*², brought by the plaintiff, as executor of J. S. deceased, for money due to the testator, but received by the defendant, after the testator's death, it appeared in evidence, that before the will was

* 2 Inst. 236.

y *Farr v. Newmap*, 4 T. R. 621. Buller J. dissentiente.

* *Quick v. Staines*, 1 Bos. & Pul. 293.

a 3 Atk. 510.

b *Hudson v. Hudson*, Ca. T. Talb. 127.

Adams v. Buckland, 2 Vern. 514.

c Per Sir J. Strange, M. R. 2 Ves. 268.

cites *Rastal*, 560. which was replevin by a surviving administrator, but no judgment.

d *Allen v. Dundas*, 3 T. R. 125.

e *Pond v. Underwood*, Per Holt C. J. London sittings, M. 1705. Ld. Raym. 1210.

(9) "If an executor become bankrupt, the commissioners cannot seize the *specific* effect of his testator." Per Lord Mansfield C. J. 3 Burr. 1369.

(10) In like manner, it is no defence to an action for a debt due, that the plaintiff is a trader, and has committed an act of bankruptcy, of which the defendant had notice, *no commission having issued nor proceedings had for that purpose*; for though voluntary payments under such circumstances are not protected, yet payments enforced by coercion of law are valid against the assignees, in case any commission should afterwards be taken out. *Foster v. Allenson*, 2 T. R. 479.

found, administration had been granted, and that the administrator had made a warrant of attorney to the defendant to receive the money, which he had done accordingly, and had paid it over to the administrator without notice of the will. Holt C. J. was of opinion, that although all acts done by an administrator where there is a will, are void, and consequently in this case an action might have been maintained against the administrator, yet the defendant, having paid over the money without notice of the will, was not liable (11).

In what Cases the Executor's Interest is transmissible.—The interest vested in B., the sole executor named in the will of A., is (if B. has proved the will) transmissible to C. the executor of B.; that is, the executor of an executor (having proved the will) is the executor or personal representative of the first testator. By 25 Edw. 3. stat. 5. c. 5. "Executors of executors shall have actions of debts, accounts, and of goods carried away of the first testators; and execution of statutes merchants, and recognisances, made in courts of record to first testator, *in the same manner as the first testator should have had if he were living*; and the executors of executors shall answer to others for as much as they have recovered of the goods of the first testators, as the first executors should do, if they were living."

The executor of the *administrator* of A. is not the personal representative of A.^h; for the administrator of A. is merely the officer of the ordinary, in whom the deceased has not reposed any trust, and, therefore, on the death of such administrator, it results back to the ordinary to appoint another. Neither is the administrator of the executor of A. the personal representative of A.ⁱ In these cases when the course of representation from executor to executor is interrupted by an intestacy, it becomes necessary that the ordinary should grant a new administration of the goods of the

^f Hayton v. Wolfe, Cro. Jac. 614.

^h Bro. Abr. tit. Adm. pl. 7.

^g Bro. Abr. tit. Administration, pl. 7.

ⁱ Ley v. Anderton, Sty. 225.

(11) Trevor C. J. had ruled differently in Jacob v. Allen, London sittings, M. 2 Ann. Salk. 27.; but see Sadler v. Evans, 4 Burr. 1986. where Lord Mansfield C. J. expressed his disapprobation of the decision in Jacob v. Allen, and recognized Pond v. Underwood. When the action for money had and received shall be brought against the principal, and when against the agent, see ante, p. 84. p. 38.

deceased, not administered by the former executor or administrator, as the case may be. Such administrator, usually termed an administrator *de bonis non*, is the legal personal representative of the deceased.

Where an Administrator de bonis non is necessary.—I shall here briefly enumerate the cases where an administration *de bonis non* is necessary.

1. Where the executor of the deceased having proved the will, dies intestate.

N. If an executor die before probate^k, although he should have administered part of the personal estate of the testator, an immediate administration must be granted.

2. Where there are several executors, and the surviving executor, having proved the will, dies intestate^l.

3. Where an administrator dies before he has administered the whole personal estate of the deceased.

In an assumpsit by an administrator *de bonis non*^m, the promise was alleged in the declaration to have been made to J. H. the first administrator of the intestate, without stating any promise to the plaintiff. After verdict for the plaintiff, an exception was taken in arrest of judgment, that it was not sufficient to allege the promise made to the former administrator, between whom and the plaintiff there was not any privity; and that it ought to have appeared on the record, that the promise was made either to the intestate or the plaintiff. Kenyon C. J. and Ashhurst J. refused to grant a rule to shew cause, observing, that there was a privity of estate in law, between the former administrator, from whom the plaintiff deduced his title, and the plaintiff.

Stat. 17. Car. 2. c. 8. made perpetual by stat. 1 Jac. 2. c. 17. s. 5.—"Where any judgment after a verdict shall be had, by "or in the name of any executor or administrator, in such "case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment."

And it has been holden to be within the equity of this statute, that an execution commenced by an administrator may be perfected by an administrator *de bonis non*ⁿ.

^k Per Holt C. J. Salk. 305.

^l Bro. Abr. Executors, pl. 149.

^m Hirst v. Smith, 7 T. R. 189.

ⁿ Clark v. Withers, Salk. 323.

III. *Of limited or temporary Administrations.*

1. *During the Minority of Executor.*—An infant, however young, may be an executor; but administration shall be granted to another during his minority (12). At the common law, such administration determined as soon as the infant executor attained the age of seventeen years, for then the infant was considered as capable of administering. But now, by stat. 38 Geo. 3. c. 87. s. 6. reciting, that inconveniences had arisen from granting probates to infants under the age of twenty-one, it is enacted, “that where an infant is sole executor, administration with the will annexed shall be granted to the guardian, or such other person as the spiritual court shall think fit, until such infant shall attain the age of twenty-one years.”

A general administrator, *ratione minoris ætatis*, shall not only have actions to recover debts and duties, but may also grant leases*.

An administrator, *durante minori ætate*, of an administrator may act and sue until the administrator be of the age of twenty-one years[†]; for administrators are by the statute, and one is not a legal person in the eye of the law capable to act for another as trustee until twenty-one.

2. *During the absence of Executor beyond Sea.*—When the executor, or next of kin, is out of the realm, administration may be granted during his absence (13).

In an action by a person, to whom such administration is granted, the absence of the executor in parts beyond the seas ought to be averred in the declaration.

By stat. 38 Geo. 3. c. 87. s. 1. “If at the expiration of twelve calendar months after the death of the testator, the executor, to whom probate has been granted, is residing out of the jurisdiction of the king’s courts, the

o 6 Rep. 67. b.

p Freke v. Thomas, Salk. 39.

(12) See the form of this administration in Prince’s case, 5 Rep. 29. b.

(13) In *Clare v. Hedges*, (said in 1 Lutw. 342. to have been adjudged in E. T. 3 W. & M. B. R.) it was holden, that such administration was grantable by law; and the case was put of the next of kin being in parts beyond the seas, in which case the debt due to the intestate might be lost, if such an administration could not be granted.

" Ecclesiastical Court, which has granted the probate, may, upon the application of any creditor, next of kin, or legatee, grounded on affidavit, grant a special administration to such creditor, &c. for the purpose of being made a party to a bill in equity, to be exhibited against him and to carry the decree into effect, and no further, or otherwise. And by s. 4. the court of equity, in which the suit shall be depending, may appoint any person to collect the debts due to the estate, and give discharges for the same. But, by s. 5., if the executor, capable of acting as such, shall return to, and reside within the jurisdiction of any of the king's courts, pending such suit, such executor shall be made party to such suit; and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person, or out of such fund, as the court shall direct."

The plaintiff, having taken out letters of administration, according to the form prescribed by the preceding statute, and having been appointed by order of the Court of Chancery, in a suit instituted against him, to collect the debts of the deceased, brought an action to recover a debt due to the testator: the defendant pleaded, that on a day prior to the commencement of the action, the executor, to whom probate of the will had been granted, died. On demurrer, the plea was holden bad by Rooke and Chambre Js. (*Alvanley C. J. dissentiente*); on the ground, that the authority of the special administration continued, until the appointment of a new representative, notwithstanding the death of the executor. Mr. J. Chambre observed^q, that although this act was made for very beneficial purposes, yet many of its provisions had been framed with a very short-sighted view of legal consequences.

3. *Pendente lite, or pending Litigation.*—When a suit is commenced in the Ecclesiastical Court, touching the validity of the will^r or right of administration, an administration may be granted pending the suit, and the person, to whom it is granted, may bring actions to recover debts due to the deceased, averring that the suit is still depending; and such administrator may be sued, inasmuch as he is, for the time, complete administrator^t (14).

^q See the form in the second section.

^r See the form in third section.

^s *Taynton v. Hanway*, 3 Bos. & Pul. 26.

^t 3 Bos. & Pul. 33.

^u *Wollaston v. Walker*, Str. 917. 2 P.

Wms. 576. S. C. recognized by Lord Hardwicke in *Wills v. Rich*, 2 Atk. 285.

^x Agreed in *Impe v. Pitt*, 2 Show. 69.

(14) "Administrations *durante absentia et minori ætate* are not

IV. *Of an Executor de son Tort* (15).

AN executor *de son tort* is a person who, without any authority derived from the deceased or ordinary, does such acts as belong to the office of an executor or administrator (16). As to the acts which will render a person liable as executor *de son tort* it will be observed:

1st. In the case of *intestacy*, if a stranger takes the goods of the intestate, and uses them, or sells⁷ them, this will make such stranger an executor *de son tort*⁸.

2dly. In the case of a *will*⁹, and a regular appointment of an executor, who proves the will; if a stranger takes the

y Read's case, 5 Rep. 33. b.
z 2 T. R. 97..

a 5 Rep. 34. a.

now to be controverted. How they came first to be allowed may be a question; yet this is certain, that nothing can be affirmed of those administrations in respect of convenience or inconvenience, which may not as justly be attributed to an administration *pendente lite*. This administration gives no sort of property, but is only a kind of trust, and the administrator himself accountable to the executor, in case the will be proved, or to the absolute administrator, if it should be rejected." Per Raymond C. J. Page and Probyn Js; Lee J. was of the same opinion for allowing the administration; but the ground of his opinion seemed to be this, that it did not appear to the court that there was any will, and therefore he thought the case was stronger in this than in either of the other limited administrations; because in them a will plainly appears, but the execution thereof is suspended through the disability of the executor. In this, perhaps, there may not be any will, and then what injury can be done to the supposed executor? The case of *Frederick v. Hook*, Carth. 153. having been cited, in which a distinction is taken between administrations *pendente lite* concerning a will, and administrations *pendente lite* concerning the right of administration, and the latter only are said to be good, but the former void; the court observed, that there was not any judgment in *Frederick v. Hook*, the parties having compromised the dispute. *Wollaston v. Walker*, MSS.

(15) Upon this subject, see Toller's law of Executors, B. 1, ch. 2. s. 2.

(16) "The bare possession of goods shall not make a man executor of his own wrong, unless he undertakes to do some acts which an executor only can lawfully do as to release the debts of the testator, &c." Per Vaughan J. C. B. in *Garter v. Dee*, Trin, 1681. Freem. 13.

goods, and, *claiming to be executor*, pays debts, &c. and intermeddles *as executor*, he may for such express administration, as executor, be charged as an executor *de son tort*, although there is another executor of right. But if, *after* the executor has proved the will, and administered, a stranger takes any of the goods, and, claiming them as his own, uses and disposes of them accordingly, this will not make him in construction of law an executor *de son tort*; because there is a rightful executor, who may be charged with these goods so taken from his possession, as assets, and to whom the stranger will be answerable in trespass for taking the goods.

3dly. In the case of a *will*, if a stranger takes the goods *before* the rightful executor has proved the will, or taken upon him the execution thereof, the stranger may be charged as an executor *de son tort*; for the rightful executor shall not be charged with any goods except those which came to his hands after he had taken upon him the charge of the will.

If a creditor takes an absolute bill of sale of the goods of his debtor^b, but agrees to leave them in his possession for a limited time, and in the mean time the debtor dies, whereupon the creditor sells the goods, he thereby becomes an executor *de son tort*.

The slightest acts have been deemed sufficient to constitute an executor *de son tort*^c (17); as where a widow milked her late husband's cows, she was adjudged to be an executrix *de son tort*. But a single act of wrong in taking the goods of the intestate, though it may be sufficient to make the party an executor *de son tort*, with respect to creditors who may chuse to sue him in that character, yet will not give him any right to retain them as against the lawful administrator.

In trover for a quantity of iron^d, it appeared that the goods in question had been originally sold by the defendant to the intestate; that, on his death, they not having been paid for, on application to the intestate's widow for that purpose, she delivered them back to the defendant in satisfaction of his demand. No other acts were stated to have

b Edwards v. Harben, 2 T. R. 587.
c Dyer, 166. b. in marg.

d Mountford v. Gibson, 4 East, 441.

(17) The jury are to determine whether the acts are sufficiently proved; but the question, whether executor *de son tort*, or not, is a conclusion of law. 2 T. R. 99.

been done by the widow, to shew that she had before taken upon herself to act as executrix. It was holden, that the plaintiff, as rightful administrator, was entitled to recover the value of the goods.

A person who possesses himself of the effects of the deceased^e, under the authority, and as agent for, the rightful executor, cannot be charged as an executor *de son tort*.

The plaintiff having received a horse belonging to the intestate^f, from the defendant, in remuneration of services performed at the request of the defendant, about the funeral of the intestate, afterwards administered to the intestate, and brought trover against the defendant for the value of the horse, so received by himself before he became administrator. It was holden by Dolben and Eyres Js. that the plaintiff, being a *particeps criminis* in the very act he complained of, should not be permitted to recover upon it against the person with whom he had colluded. But Holt C. J. was of a different opinion, conceiving that in this case if a stranger, or third person, had taken out letters of administration, an action might have been maintained against the defendant by such an administrator for the recovery of the horse; and here the plaintiff was a third person; *for being administrator he sued, and would recover*, in the right of the intestate.

An executor *de son tort* must be declared against as a rightful executor^g.

See further on the subject of executor *de son tort* under sect. ix. post. tit. *Pleadings; and of the right of retaining*.

V. *Of the Disposition of the Estate of the Deceased, and of the Order in which such Disposition ought to be made.*

THE order of payment, which ought to be observed by executors and administrators in the disposition of the estate of the deceased, is as follows;

^e Hall v. Elliot, Peake's N. P. C. 86.

^f Whitehall v. Squire, Carth. 103. Salk. 295. Skin. 274. 3 Mod. 276. S. C.

^g Yelv. 137.

1. Funeral charges (18), expenses of probate, or taking out letters of administration^a.

2. Debts due to the king (19), by record (20), or specialty (21).

3. Forfeiture for not burying in woollenⁱ; debts due to the post-office, not exceeding 5*l*.^k; debts due from an overseer of the poor, by virtue of his office^l.

4. Debts by mortgage^m; by judgments in the Court of King's Bench, Common Pleas, and Exchequer, doggeted (22) according to the directions of stat. 4 & 5 W. & M. c. 30; by judgment in other courts of record; by decrees in courts of equityⁿ; (23) according to their respective priorities.

5. Recognisances at common law; statutes merchant and staple^o; and recognisances in the nature of statutes staple, pursuant to stat. 23 H. 8. c. 6. (24).

6. Arrears of rent due at the death of the testator or intestate, either on a parol lease (25) or lease by deed (26); debts by specialty, as bonds (27); damages upon covenants broken (28), &c.

7. Debts by simple contract, as bills of exchange (29), promissory notes, &c.

8. Legacies, &c.

^a 1 Roll. Abr. 926. (S) pl. 1. Dr. & Stud. Dial. 2. c. 10.
ⁱ Stat. 30 Car. 2. c. 3. s. 4.
^k Stat. 9 Ann. c. 10. s. 30.
^l Stat. 7 G. 2. c. 38. s. 3.

^m Symmes v. Symonds, 1 Bro. P. C. 66.
ⁿ Scasle v. Lane, 2 Vern. 88.
^o 4 Rep. 59 b. 60 a. 1 Roll. Abr. 925.
5 Rep. 38 b.

(18) In strictness no funeral expenses are allowed against a creditor except for the coffin, ringing the bell, parson, clerk, and bearers' fee; but not for the pall or ornaments. Per Holt C. J. in Shelley's case, Salk. 296. The usual method is to allow 5*l*. Bull. N. P. 143. This sum was allowed by Lord Hardwicke C. J. in Smith v. Davis, Middlesex Sittings after M. T. 10 G. 2. MSS. But if there are assets, the allowance shall be according to the estate and degree of the deceased. In Stagg v. Punter, 3 Atk. 119. the testator having desired to be buried at a church 30 miles distant, and it not being clear that there would be a deficiency, Lord Hardwicke C. allowed 60*l*. for funeral expenses. So in Offley v. Offley, Prec. Ch. 26. 600*l*. were allowed in respect of the testator's quality, and his having been buried in his own country.

(19) See the notes from (19) to (29) in the following pages.

(19) The king, by his prerogative, shall be preferred by creditors in satisfaction of his debt before any other. 2 Inst. 32.

(20) Fines and amerciaments, in the king's courts of record, are debts of record. Went. Off. Exec. ch. 12.

(21) By stat. 83 H. 8. c. 39. it is enacted, "that all obligations and specialties for any cause concerning the king shall be taken *domino regi*, and shall be of the same force and effect as a statute staple."

(22) At common law, executors and administrators were bound at their peril to take cognizance of debts of the testator upon record*. Hence to an action on a judgment recovered against testator or intestate, executors or administrators could not plead, that they had exhausted the assets in payment of debts of an inferior nature without notice of the judgment. To obviate the mischief to which personal representatives were liable, from the difficulty of finding such judgments, the stat. 4 & 5 W. & M. c. 20. s. 2. directs, "that the proper officers of the courts of common pleas, king's bench, and exchequer, shall make a dogget of all judgments entered in the respective courts." The mode in which the dogget is to be made, is detailed in the second section; and by s. 3. "judgments not doggetted as the second section directs, shall not have any preference against executors and administrators in the administration of their testator's or intestate's estates." The construction which has been put on this section is, that judgments not doggetted are thereby placed on a level with simple contract debts. Hickey v. Hayter, 6 T. R. 384. Hence, to an action on a simple contract debt of testator or intestate, the personal representative cannot plead an outstanding judgment recovered against testator or intestate, in C. B., B. R., or Exchequer, if it has not been doggetted as the statute directs. Steele v. Rorke, 1 Bos. & Pul. 307.

If a judgment be satisfied, or only kept on foot to injure other creditors, or if there be any defeasance of the judgment yet in force, then the judgment will not avail to keep off other creditors from their debts. Went. Off. Exor. c. 12.

Between one judgment and another, precedency or priority of time is not material, but he who first sueth the executor must be preferred, and before execution sued, it is at the election of the executor to pay whom he will first. Went. Off. Exor. c. 12.

(23) It is now become the established doctrine, that a decree of the Court of Chancery is equal to a judgment in a court of law†: and where an executrix of A., who was greatly indebted to divers persons, in debts of different natures, being sued in chancery by some of them, appeared and answered immediately, admitting their demands, (some of the plaintiffs being her own daughters,) and other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the Court of Chancery, being for a just debt, and having a real priority in point of time, (not by fiction and relation to the first day

* Littleton v. Hibbins, Cro. Eliz. 793.

† 3 P. Wms. 401. n. (F.).^u

of term,) was preferred in the order of payment to the judgments; and the executrix protected and indemnified in paying obedience to such decree, and all proceedings against her at law stayed by injunction. *Morrice v. The Bank of England*. Decreed first at the Rolls by Sir Joseph Jekyll, Aug. 1735, which decree was affirmed by Lord Talbot C.* Nov. 1736, and *Ld. Talbot's* decree was afterwards affirmed in parliament†, May 24, 1737. See also *Shafto v. Powell*, 3 Lev. 355.

(24) This must be understood of recognisances and statutes forfeited, where the recognisances are for keeping the peace, good behaviour, &c. and the statutes are for performing covenants, &c. A recognisance not enrolled was considered in *Bothomley v. Fairfax*, 1 P. Wms. 334. as a bond (the sealing and acknowledging of the recognisance supplying the want of delivery), and to be paid as a specialty debt.

(25) Arrears of rent on a parol lease, which is determined, are in equal degree with a bond debt; because the contract remains in the realty, though the term be determined. *Newport v. Godfrey*, 3 Lev. 267. and 2 Ventr. 184. See an exposition of this case by Holt C. J. in *Cage v. Acton*, *Ld. Raym.* 516.

(26) A debt due for rent reserved upon a demise by deed, or by parol‡, is in equal degree with a bond debt. *Gage v. Acton*, *Carth.* 511.

(27) A bond with a penalty conditioned for the payment of a less sum of money on a day, not arrived at the death of testator, may be pleaded by his executor as a specialty debt §, as well as a forfeited bond; but there is this distinction between them, that in the case of a bond forfeited, the penalty is the legal debt, and assets may be covered to that amount; but in the case of a bond not forfeited, as the executor by discharging it may save the penalty, the assets can be covered only to the amount of the sum mentioned in the condition||. Where there are several debts by specialty, all due and payable at the death of the testator, if suit is not commenced by any of the creditors, and notice thereof given to the executor, he may give the preference to whom he pleases, and if he be a creditor himself, he may pay himself first. *Went. Off. Exor.* c. 12.

Any voluntary bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt. Indeed, if the bond be merely voluntary, a real debt, though by simple contract only, shall have the preference; but if there be not any debt, then a bond, however voluntary, must be paid by an executor.

(28) Covenants running with the land are binding on the executors, although not expressly named. See *Went. Off. of Exors.* p. 178. ed. 1763.

(29) See *Yeomans v. Bradshaw*, *Carth.* 373.

* *Ca. Temp. Talb.* 217.

§ *Lemun v. Fooke*, 3 Lev. 57.

† 4 Bro. P. C. 287. ed. Fo. 3 Bro.

|| *Bank of England v. Morrice*, *Sir.* P. C. 465. *Tomlin's* ed.

1028.

‡ *Brown v. Holyoak*, *Barn.* 990.

VI. *Admission of Assets* (30).

WHILE an executor is passive, he is chargeable only in respect of the assets; but if he promises to pay a debt of the testator at a future day, he thereby makes it his own debt, and it shall be satisfied by his own goods^o.

A judgment against an executor by default^p is an admission of assets to satisfy the demand; and if a *fi. fa.* be sued out on such judgment, and the sheriff cannot find goods of the testator sufficient to answer the demand, the sheriff may return a *devastavit*.

The preceding case has been considered as a leading case on this subject: hence, where A. having executed a bond for the payment of a sum of money at her death^q; and the defendant having brought an action on the bond against the plaintiff as the executor of A. who pleaded *non est factum*, which was found against him, and judgment thereon: on a bill filed by the plaintiff to have the bond and judgment set aside, Lord Hardwicke C. being of opinion, that the bond was good, it became a question, whether the plaintiff was not entitled to relief, on the ground that there was a deficiency of assets. Lord Hardwicke decided, that the plea of *non est factum*, and verdict thereon, amounted to an admission of assets; and that the case was the same with the preceding case of a judgment by default.

So where in debt in the detinet against defendant^r (as ex-

^o Per Yelverton J. in *Goring v. Goring*, Yelv. 11.

^p *Rock v. Leighton*, from Holt's MSS.

^q 3 T. R. 690. Salk. 310. S. C. but not accurately reported.

^r *Ramsden v. Jackson*, 1 Atk. 293.

^r *Skelton v. Hawling*, 1 Wils. 258. and MSS. See also 1 Saund. 219. d. where this case is correctly stated by Serjt. Williams, who examined the roll.

(30) All sperate debts, mentioned in the inventory, shall be deemed assets in the executor's hands; but the executor may discharge himself by shewing a demand and refusal of them. Shelley's case, per Holt C. J. Salk. 296. In the inventory, which the defendant had exhibited in the ecclesiastical court, were inserted several debts due and outstanding, which defendant charged herself with when received or recovered: Lord Hardwicke C. J. put the defendant on proof, that she could not recover those debts; for she ought in her inventory to have set forth which debts were sperate and which desperate. The defendant proved by a witness who went to demand several of them, that he could not recover them; and accordingly they were allowed as desperate. *Smith v. Davis*, Middlesex Sittings after M. T. 10 G. 2. MSS.

ecutor of A, administratrix of B.) upon a judgment by default, obtained by plaintiff against A, as administratrix, suggesting that goods of the intestate had come to the hands of A. as administratrix, which she had wasted; defendant pleaded, 1. *Non detinet*, on which issue was joined; 2dly, that defendant had fully administered the goods of A. Replication, that the defendant had goods of A. sufficient to satisfy, &c. and issue. The jury on the last issue found assets of A. in the hands of defendant. On the other issue, the plaintiff produced the judgment by default against A., on which he relied as evidence of assets admitted by A., and a devastavit by A. Lee C. J. (delivering the opinion of the court) said, that he could not do it better than in the words of Holt C. J. in *Rock v. Leighton*. Having read that case from Holt's notes, he observed, that it appeared from that case, that if an executor will not take advantage by pleading, but suffers judgment to go by default, such judgment is an admission of assets, and is as strong against an executor, as if assets were found by verdict on a *plene administravit*; and, notwithstanding the objection, which had been raised on the ground of the statutes 30 Car. 2. c. 7. (31) and 4 & 5 W. & M. c. 24. s. 12. he was clear, that the action in the case then before the court was well brought.

On the authority of the preceding cases of *Rock v. Leighton*, *Ramsden v. Jackson*, and *Skelton v. Hawling*, it was holden, that where an executor (to an action of debt on bond) had pleaded payment, which was found against him, and judgment accordingly, it operated as an admission of as-

s *Erving v. Peters*, 3 T. R. 695.

(31) By stat. 30 Car. 2. c. 7. s. 2. (made perpetual and enlarged by 4 & 5 W. & M. c. 24. s. 12.) "The executors and administrators of their own wrong, or administrators who have wasted and converted the assets of the deceased to their own use, shall be chargeable in the same manner as their testator or intestate would have been if living." A doubt having arisen upon the preceding clause, whether it extended to the executors and administrators of any executor or administrator of right, who, for want of privity, were not before answerable for the debts due from the first testator or intestate, although such executor or administrator of right had been guilty of a devastavit or conversion, it was enacted by stat. 4 & 5 W. & M. c. 24. s. 12. "that the executor and administrator of such executor or administrator of right, who should waste or convert to his own use the estate of his testator or intestate, should be chargeable in the same manner as his testator or intestate would have been."

sets: and a writ of *fi. fa.* having been sued out on the judgment, to which the sheriff had returned a *devastavit*, and an action having been brought against the executor on the judgment suggesting a *devastavit*; it was holden, that the production of the record of the judgment, the writ of *fi. fa.*, and the sheriff's return, was sufficient evidence to support the action.

If an executor pay interest on a bond due from his testator, it will not conclude him from alleging want of assets to pay the principal, but it relieves the creditor from the necessity of proving assets, and throws the onus on the other side.

Where defendant binds himself as administrator^a, to abide by an award touching matters in dispute between his intestate and another, and the arbitrator awards, that defendant as administrator shall pay a certain sum, it operates as an admission of assets between those parties, and defendant cannot plead *plene administravit* to an action of debt on the bond; because the giving such bond is an undertaking to pay whatever the arbitrator may award. And in such case, if an attachment be moved for against the administrator^a, for the nonpayment of the money awarded, he cannot defend himself against it, by suggesting a deficiency of assets; for a submission to arbitration by a personal representative is considered as a reference, not only of the cause of action, but also of the question, whether or not he has assets. And when the arbitrator awards that the personal representative do pay the amount of the plaintiff's demand, it is equivalent to determining, as between those parties, that the personal representative had assets to pay the debt.

But mere submission to arbitration is not of itself an admission of assets^b; for in a case where the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it, it was holden, that the administrator might plead *plene administravit*.

^a *Cleverly v. Brett*, B. R. 11 G. 3. ^b *Barry v. Rush*, 1 T. R. 691.
 cited in *Pearson v. Henry*, 5 T. R. ^x *Worthington v. Barlow*, 7 T. R. 432.
^y *Pearson v. Henry*, 5 T. R. 6.
⁸ See 2 Ves. 85.

VII. Of Actions by Executors and Administrators.

1. *What Actions may be brought by Executors and Administrators.*—By the common law, executors might have maintained actions to recover *debts* due to their testator, but they could not maintain actions for a wrong done to their testator in his life-time; e. g. a trespass in taking his goods, &c. But by stat. 4 Edw. 3. c. 7. reciting, *that in times past executors had not had actions for a trespass done to their testators, as of the goods of the said testators carried away in their life*, it is enacted “that the executors in such cases shall have an action against the trespassers (32) in like manner as they, whose executors they are, should have had if they were living.”

This statute has been expounded largely, with respect to the persons and the actions. With respect to the persons^a, it has been holden, that an administrator is within the equity of this statute, and shall have trespass for goods carried away in the life-time of the intestate. With respect to the actions, it has been resolved^b, that where, upon a church becoming void, the bishop collated wrongfully, and the patron died, the executor of the patron might, by the equity of this statute, maintain a *quare impedit* (33). So an executor may have an action of trover for the conversion of the testator's goods in his life-time^b; or an action of debt on stat. 2 & 3 Edw. 6. c. 13. for not setting out tithes due to

^a *Smith v. Colgay*, Cro. Eliz. 384.

^b *Rutland v. Rutland*, Cro. Eliz. 377.

^a 4 Leon. 15. Case 53. cited in *Le Ma-
son v. Dixon*, Sir W. Jones, 174, 5.

(32) “This act does not speak of *actions of trespass*, though the instance put is proper for such an action; but it speaks of actions for a *trespass* done to the testator's goods, and it enacts that in such cases executors shall have an action against the trespasser; apparently using the word *trespass*, as meaning a wrong done generally, and the trespassers as wrong doers; it does not specify the nature of the action.” Per Lord Ellenborough C. J. in *Wilson v. Knubley*, 7 East, 134, 5. See also the opinion of Lawrence J. to the same effect, 7 East, 136. “This statute is a remedial law, which has always been taken by equity, and wherever there is a matter of property in question, it is brought within the statute.” Per Powel J. *Ld. Raym.* 974.

(33) *Ejectio firmæ* will lie at the suit of an executor for the ouster of his testator. 7 H. 4. 6. b. Bro. Abr. Exor. 45. S. C.

the testator^c; or an action on the case against a sheriff for a false return made in the life of the testator to a *fi. fa.* viz. that he had levied only so much, part whereof he had sold, and part remained in his hands for want of purchasers^d; or an action of debt on a judgment against an executor, suggesting a devastavit in the life-time of plaintiff's testator^e. In like manner, it has been holden, that an administrator may maintain an action against the bailiff of a liberty for executing a *fi. fa.* and removing the goods off the premises, before the landlord (the intestate) was paid a year's rent, pursuant to the stat. 8 Ann. c. 17.^f But an executor shall not have trespass *de clauso fructo*^g; for *moritur cum personâ illa actio*.

By stat. 11 Geo. 2. c. 19. s. 15. "Executor or administrator of tenant for life, on whose death any lease of lands, &c. determined, shall in an action on the case, recover, from the under-tenant, a proportion of the rent reserved, according to the time such tenant for life lived of the last year, or quarter of a year, or other time in which the said rent was growing due."

By the common law^h, an executor or administrator could not have an action of account; because it was founded on a matter in the privity of the testator; but now, by stat. 13 Edw. 1. c. 23., "An executor shall have an action of account upon an account with his testator."

By 25 Edw. 3. stat. 5. c. 5. "Executors of executors shall have actions of debts, accounts, and of goods carried away of the first testators, in the same manner as the first testator should have had."

Administrators derive their authority to bring actions from the stat. 31 Edw. 3. c. 11. which provides, that "where a man dies intestate, the ordinary shall depute the next and most loyal friends (34) to administer his goods, which deputies may bring actions to demand and recover, as executors, the debts due to the intestate."

2. Executors and Administrators must join in bringing

c Moreton's case, 1 Vent. 30.

f Palgrave v. Windham, Str. 212.

d Williams v. Grey, Lord Raym. 40.

g Bro. Exors. 120.

e Berwick v. Andrews, Ld. Raym. 973.

h 2 Inst. 404.

(34) A subsequent statute, 21 H. 8. c. 5. s. 3., in case of intestacy or executors refusing to prove, directs the ordinary to grant administration to the widow or next of kin; and where two or more stand in equal degree, to accept which he pleases.

Actions.—It is a general rule, that, if there are two or more executors, and one proves the will, they must all join in bringing actions; and if they do not, the defendant may plead in abatement, that there are other executors living not named¹. In this plea it is not necessary to aver, that the executors not named have administered²; because they may administer at their pleasure. So where there are two or more administrators, it is necessary that they should join in bringing actions¹.

And this rule, viz. that all the executors shall join, holds even where some of them refuse before the ordinary³; because the refusing executors may come in at any time⁴, and administer, notwithstanding their refusal, either during the lives of their co-executors who have proved, or after their death⁵.

The like law is, where some of the executors are infants; they must all join, and they may all appear by attorney; for those of full age may appoint an attorney for those within age⁶. So where there are two executors, one of full age, and the other within age; and the executor of full age is appointed administrator, *durante minori etate* of the other executor.

A. made B. and C., who was an infant under seventeen, executors; B. only proved the will, and brought debt as executor against defendant (omitting C.) Plea in abatement, that C. was made an executor with B., and is yet in full life, not named⁷, &c. Replication, that C. was of the age of one year, that B. proved the will, and had administration committed *durante minori etate*, and that C. is still under seven years of age. On demurrer, judgment for defendant; for, although by the administration committed *durante minori etate* B. hath the full power, yet C. the infant, being executor, ought to be named.

3. *Of joining several Causes in one Action by Executors* (35).—In order to join several causes in one action, the ac-

i Reg. 140. b. Bro. Exors. pl. 69. Fitz.

Abr. Exors. pl. 48.

k 41 E. 3. 22. a.

l Reg. 140. b.

m Hensloe's case, 9 Rep. 36. b.

n Bro. Exors. 117. Fitz. Abr. Exors.

96.

o 21 Edw. 4. 23. b. 24. a. recognised by Holt C. J. in Wankford v. Wankford, Salk. 307.

p Foxwist v. Tremain, 2 Saund. 912.

q Smith v. Smith, Yelv. 130. 1 Brownl.

101. S. C.

(35) "The cases on this subject are somewhat perplexed." Ld. Ellenborough C. J. 3 East, 110.

tion must be brought as to all such causes in the same right (36). Hence, a plaintiff cannot join, in the same action, a demand, as executor or administrator, with another demand, which accrued in his own right. The reason is, because the funds, to which the money and costs, when recovered, are to be applied, or out of which the costs are to be paid, are different; and the damages and costs being entire, the plaintiff cannot distinguish how much he is to have in his representative character, and how much he is to hold as his own. Hence, it was holden in *Rogers v. Cook*, Salk. 10. that a count on an *indebitatus assumpsit* to A. as administrator, could not be joined with a count on an *insimul computasset* in his own name.

It is frequently difficult to decide what causes of action an executor may join when suing in his representative character. In *King v. Thom*, 1 T. R. 489. Buller J. (adopting the rule laid down in *Bull v. Palmer*, 2 Lev. 165. and *Mason v. Jackson*, 3 Lev. 60.) thought that the solution of this question depended on this, viz. Whether the sum or goods, when recovered, would be considered as assets of the testator; if they would, then the plaintiff might sue in his representative character. In *Cockerill v. Kynaston*, 4 T. R. 281. the same learned judge expressed the same opinion; which was adopted by Lawrence and Le Blanc Js. in *Ord v. Fenwick*, 3 East, 110.; and in *Cowell v. Watts*, 6 East, 405. the court of K. B. agreed, that where the sum recovered, and costs, must be applied to the estate of the testator or intestate, the counts might be joined; and that those cases, in which the rule had been laid down, that counts might be joined, wherever the money recovered under them would be assets, afforded the best guide to the court in the solution of questions of this kind. Upon this principle it was holden^r, that a count, upon a promise to the plaintiff as administratrix, for goods sold and delivered by her after the death of the intestate, might be joined with a count, upon an account stated with her, as administratrix, of money owing from the defendant to the plaintiff as administratrix, and a promise to pay her as administratrix. In *Ord v. Fenwick*, 3 East, 104. on writ of error after ver-

^r *Cowell v. Watts*, 6 East, 405.

[36] In *Petrie v. Hannay*, 3 T. R. 659. Buller J. said, that it was the constant practice to join in the same declaration a count for money had and received to the use of the executor *as such*, and a count for money had and received to the use of the testator.

dict and judgment in *C. B.* it was resolved, that a count for money paid by the plaintiff as executrix might be joined with a count for money paid by the testator; because it did not appear but that the executrix might have been compelled to pay the money upon an obligation by the testator as surety for the defendant, to repay which the law would raise an implied promise by the defendant to the plaintiff as executrix (37).

It must be observed, that if executors take a note or bond from a debtor to the estate of their testator, the executors must declare on such note or bond in their own names, and not in their character as executors; and they cannot join a count on such note or bond, with counts on causes of action accruing to them in right of testator (38).

In *Betts v. Mitchell*, 10 Mod. 315. the plaintiff declared upon several promises made to his testator, and also on a promissory note to himself as executor; and it was insisted, that the last count could not be joined with the former counts, the words, "as executor," being only a description of the plaintiff's person, whereas the note was made to him and transferrable by his endorsement, and would go to his administrator, and not to the administrator *de bonis non*; and this reasoning was adopted by the court, who gave judgment for the defendant, on demurrer to the declaration. So where the plaintiffs, as executors, declared in the debt and detinet, on a bond given to their testator, and also on a bond given to themselves as executors; it was resolved on special demurrer to the declaration, that the two causes of action could not be joined.

6 *Hosier and another v. Ld. Arundel*, 3 Bos. & Pal. 7.

(37) In *Henshall v. Roberts and another*, 5 East, 154. Lord Ellenborough C. J. seems to have been of opinion, that a count on a promise to plaintiff, as executor, on an account stated with plaintiff, as executor, concerning money due to plaintiff, as executor, could not be joined with other counts on promises made to the testator.

(38) But in *King v. Thom*, 1 T. R. 487., it was held by Ashurst and Buller Js. that a count against the defendant as acceptor of a bill of exchange, endorsed by the payee to the plaintiffs, surviving executors of J. S. in right of the plaintiffs as surviving executors, might be joined with counts for money had and received by defendant to the use of plaintiffs as executors, and on an account stated with plaintiffs as executors.

VIII. *Of Actions against Executors and Administrators.*1. *What Actions may be maintained against Executors.—*

It is a general rule, that an action, wherein the testator might have waged his law (39), cannot be maintained against his executors or administrators^t. Hence, *debt* on a simple contract, as on a promissory note^a, will not lie against an executor or administrator. So *debt* does not lie against an executor^r or administrator^v upon an award made in the life-time of the testator or intestate, if the executor or administrator demurs to the declaration. But if the defendant pleads in bar to the action, and a verdict is found against him, he cannot take advantage of it afterwards, either in arrest of judgment or by writ of error^z. No inconvenience results from this rule of law, since the debt may be recovered in an action of assumpsit, which will lie against an executor or administrator^a, notwithstanding it is in form an action of trespass on the case. Neither does the maxim, *actio personalis moritur cum persona*, afford any objection to the bringing this action: for an action upon a promise upon a good consideration, without specialty, to do a thing, is not more annexed to the person than a covenant by specialty to do the same thing. This point was solemnly determined in *Norwood v. Rede*, Plowd. 181., and *Pinchon's case*, 9 Rep. 86. b., where actions of assumpsit were brought against executors for the non-payment of money due from their testators. And in *Carter v. Fosset*, Palm. 329. and Cro. Jac. 662. it was resolved, on error, in the Exchequer Chamber, that assumpsit would lie against an executor for the breach of a collateral promise made by testator. The declarations in *Norwood v. Rede*, and *Pinchon's case*, contained averments, that the defendants, the executors, had assets to pay the debts of the testator; but in *Cottingham v. Hulett*, Cro. Eliz. 59., this was holden unnecessary, on the ground, that want of assets was matter of defence.

^t Bro. Exors. 80.

^u *Barry v. Robinson*, 1 Bos. & Pul. N. R. 293

^x *Hampton v. Boyer*, Cro. Eliz. 557.

^y *Bowyer v. Garland*, Cro. Eliz. 600.

^z Plowd. 182. a.

^a *Palmer v. Lawson*, 1 Lev. 201.

(39) Wager of law, though it has fallen into disuse, is not abolished. See 1 Bos. & Pul. N. R. 297.

Assumpsit will not lie against an executor^b for a legacy payable out of the general funds of the testator, although assets be averred in the declaration; for the law will not, from the mere circumstance of an executor's being possessed of assets, imply a promise by him to pay such legacy. But an action may be maintained by the legatee^c of a specific chattel, against an executor, after his assent to the bequest.

An acting executor having once received^d, and fully had under his control, assets of the testator applicable to the payment of a debt, is responsible for the application thereof to that purpose: and such application having been disappointed by the misconduct of his co-executor, whom he employed to make the payment in question, he is liable for the consequences of such misconduct, as much as if the misapplication had been made by any other agent of a less accredited and inferior description (40).

Where a sheriff levies money under a *fi. fa.* and dies, an action may be maintained against his executors for the money so received^e.

Trover will not lie against an executor for a conversion by his testator^f. In this case, the maxim, *actio personalis moritur cum personâ* applies (41).

By stat. 29 Car. 2. c. 3. s. 4. "No action shall be brought to charge any executor or administrator upon any special promise, to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writ-

^b Deeks v. Strutt, 5 T. R. 690.

^e Perkinson v. Gilford, Cro. Car. 539.

^c Doe v. Guy, 3 East, 120.

^f Hambly v. Trott, Cowp. 371.

^d Crosse v. Smith and another, 7 East, 246.

(40) By the old law, there was a distinction between executors and trustees. It was laid down as a general rule, that where executors joined in a receipt, both having the whole power over the fund, both were chargeable; where trustees joined, each not having the whole power, and the joining being necessary, only the person receiving the money was chargeable; but the rule as to executors has been in some degree relaxed. See the opinion of Eldon C. in Chambers v. Minchin, 7 Ves. jun. 197. 8.

(41) It is extremely difficult to collect from the cases on this subject any general rules with respect to the application of this maxim. See, however, Serjeant Williams's note (1) to the case of Wheatly v. Lane, 1 Saund. 216.

"ing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

At the common law, an executor or administrator could not have been charged on any special promise to answer damages out of his own estate, unless such promise had been made on a sufficient consideration. The statute has not made any alteration in this respect. The promise, though in writing, still requires a sufficient consideration to support it¹. And² the consideration as well as the promise must be expressed in the written memorandum or note.

2. *What Causes of Action may be joined against Executors.*—Several demands, some of which accrue from the defendant in his own right, and others in right of another, ought not to be joined in the same action; because such demands require different pleas and different judgments. Hence, if a declaration against an executor or administrator contains counts, which charge him in his representative character, and counts, which charge him in his own right, such declaration will be bad, for misjoinder of cause of action, either on general demurrer³, or in arrest of judgment, or on writ of error.

The four first counts in the declaration were on promises made by the intestate⁴; the fifth stated, that *after the death of the intestate*, the defendant, as administratrix, was indebted to the plaintiff for money, by the defendant, as such administratrix, had and received to the use of the plaintiff. On special demurrer, assigning for cause, that the two causes of action, the one from the intestate, and the other from the administratrix, could not be joined; the court were clearly of opinion, that they could not; because the last count stated a cause of action after the intestate's death, which would exclude one of the pleas that might be pleaded to the other counts, and would warrant a different judgment. So, counts on promises by the testator, cannot be joined with counts for money had and received by the defendant as executor⁵, or for money lent to defendant as executor⁶, or on account stated of money *due from defendant as executor*⁷, because the former charge the defendant in right of the testator, whereas the latter charge him in his own right.

But where an action was brought against an administra-

g. *Bang v. Hughes*, 7 T. R. 350. n.

h. *Wain v. Warlters*, 5 East, 30.

i. *Brigden v. Parks*, 2 Bos. & Pul. 424.

k. *Jennings v. Newman*, 4 T. R. 347.

l. *Brigden v. Parks*, 2 Bos. & Pul. 424.

and *Rose v. Bowler*, 1 H. Bl. 108.

m. 1 H. Bl. 108.

n. *Ibid.*

trust, and the three first counts of the declaration were on promises by the intestate, and the last was on an account stated between plaintiff and defendant, as administratrix, of money owing from the intestate, and in consideration of the intestate being found indebted, a promise by defendant, as administratrix, to pay; the court were of opinion that there was not any misjoinder of action, that the defendant was charged as administratrix in all the counts, and that this was the common mode of declaring, to save the statute of limitations.

To a count in covenant, charging the defendants, as executors, for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors, and assigns, may be joined another count, charging them, that after the executors' death, and their proving the will, and during the term, the demised premises came by assignment to one D. A., against whom breaches were alleged; and concluding, that so neither the testator, nor the defendants after his death, nor D. A. since the assignment to him, had kept the said covenant, but had broken the same.

3. *What Executors are to be made Defendants.*—It has been observed, that in actions brought by executors, it is necessary, that where there are two or more, they should all join, whether they administer or not, if one of them has proved the will. But this is not necessary when actions are brought against them; for the mere circumstance of a person being named executor does not compel the plaintiff to make him a defendant, unless he has administered. Hence, where executors, defendants, plead in abatement, that there are other executors not named, they must add, that the executors not named have administered; for the plaintiff is bound to take notice of such executors only as have administered. Although executors cannot sever in declaring, yet they may in pleading. Hence, although infant executors may sue by attorney with executors of full age, because those of full age may appoint an attorney for those within age, yet they must defend by guardian. If any of the executors die, actions must be brought, not against the surviving executors and executors of deceased executors, but against surviving executors only.

If there are two or more administrators, they must all be

o *Secar v. Atkinson*, 1 H. Bl. 102.

p *Wilsor v. Wigg*, 10 East, 313.

q *Bro. Evers*, pl. 69.

r *Swallow v. Emberson*, 1 Lev. 161.

s *Frescobaldi v. Kinaston*, Str. 782.

t 4 Leon. 198. *Bro. Evers*, 99. *Rich. Abr. Exor.* 25.

made defendants^a. An executor *de son tort* must be declared against as a rightful executor^a.

IX. *Of the Pleadings, and herein of the Right of Retainer—Evidence—Costs—Judgment.*

AN executor may plead the same plea in bar^a, that his testator might have pleaded; as, in an action of assumpsit he may plead, that his testator did not undertake or promise; or in covenant, or debt on bond, that it is not the deed of the testator. So an executor may plead in bar, that he has fully administered all the goods and chattels which were of the deceased at the time of his death. This plea is termed a plea of *plene administravit*. In like manner an executor may plead an outstanding debt, as a judgment, in which plea it is not necessary for the executor to aver that the judgment was had for a true and just debt^b; for this shall be presumed. So where an executor pleaded^c that his testator entered into a bond conditioned for the payment of a sum of money at a day past, beyond which he had not assets; it was holden sufficient, although it was not averred that the bond was entered into for a true and just debt; for it shall be intended that it was. And the same intendment shall be made, where an executor or administrator pleads a bond debt due to himself and retainer^b.

The ancient way of pleading an outstanding bond was to set forth the bond only; but the modern way is to set forth the condition also.

When the day of payment^c, mentioned in the condition of the bond, is past in the life-time of the testator, the penalty is the legal debt; and although an executor, in pleading it as an outstanding debt, sets forth the condition of the bond, yet that will not deprive him of the advantage of covering the assets to the amount of the penalty. But when the day of payment is not arrived at the death of the testator, if the executor sets forth the condition, the assets can be covered only to the amount of the sum mentioned in

^a Reg. 140. a. b.

^x *Alexander v. Lane*, Yelv. 137.

^y Com. Dig. Pleader, (2 D. s.)

^z 1 Lev. 200.

^a *Lake v. Raw*, Carth. 8.

^b *Picard v. Brown*, 6 T. R. 550.

^c *Bank of England v. Morrice*, Str. 1028. Hardw. C. J. delivering the opinion of the court.

the condition; for the force of the bond is suspended until the condition is broken.

To an action of debt on bond for 300*l*.^d against defendant, as executor, he pleaded that the testator was bound in a statute for the same sum, and that he had assets to the amount of 80*l*. only, to satisfy that statute, which remained yet in force and not paid. On demurrer, it was objected, that it was not averred in the plea, that the statute was made for *debt*, and that the debt was not satisfied; for if it were for the performance of covenants, it was not reasonable that it should be a bar to debt on a bond already due, when, perhaps, the covenants would never be broken (42), in which case there would not be any cause of suit or extent thereon. But the court resolved, that the plea was good; for, as it was averred that the statute was in force, and the money not paid, it was good enough *primâ facie*, and it should be intended to be made for a just debt, until the contrary was shown.

An executor^e may plead an outstanding judgment recovered in an action of *debt* on a simple contract against the executor, although the executor might have reversed such judgment, since debt cannot be maintained against an executor on a simple contract.

If an action be brought against several administrators^f, they may plead an outstanding judgment recovered against one of the defendants; for a recovery against one administrator shall bind him and his companions.

After the commencement of an action, an executor cannot pay another creditor before such other creditor has recovered judgment, but the executor may confess a judgment for the damages laid in the declaration^g, without ascertaining those damages by writ of inquiry, provided they do not exceed the real debt. If they do, the plaintiff may reply that such judgment was not for a true and just debt.

An executor may confess a judgment to a creditor *in equal degree* with the plaintiff, pending the action, and plead it in bar^h. But if a plea of judgment recovered on a simple

^d Phillips v. Echard, Cro. Jac. 8.

^e Palmer v. Lawson, 1 Lev. 300.

^f Farther v. Farther, Cro. Eliz. (471.)

^g Waring v. Danvers, 1 P. Wms. 295.

10 Mod. 496. 3 P. Wms. 401.

^h Waring v. Danvers, 1 P. Wms. 295.

Morrice v. Bank of England, Ca.

Temp. Talb. 225. S. P.

(42) It was agreed by Fenner, Gawdy, and Yelverton, Justices, that a statute for performance of covenants was not a bar in debt on bond, if none of the covenants were broken.

contract, be pleaded by an executor to a debt on bond, it must be averred, that such recovery was had before notice of the bond debt¹.

Where judgment was given against A. in the Common Pleas, who afterwards entered into a statute and died; and his administrator brought error on the judgment, and, pending that suit, paid the statute, and afterwards the judgment was affirmed; upon a *sci. fa.* to have execution thereon, the administrator pleaded payment of the statute, beyond which he had not assets. It was adjudged a good plea, because, at the time of the execution of the statute, the administrator could not plead the judgment in C. P., because it was doubtful whether it would be affirmed or not².

To a plea of an outstanding judgment, the plaintiff may reply, that the judgment was obtained by fraud and covin. And in a case where an executor, defendant, pleaded two outstanding judgments, to each of which the plaintiff replied fraud, and traversed that the debts recovered were due for just debts³: the replication was holden good on special demurrer, the court observing, that the plaintiff might traverse the special matter, or rely on the fraud generally at his election (43).

If to a plea by executors of an outstanding judgment, the plaintiff replies, that judgment was acknowledged for a larger sum than was due to the party⁴; it seems that the defendant may rejoin that the testator was indebted to A., B., and C., in so much respectively, and that the judgment was acknowledged to A. in trust to secure all their debts.

Where the statute of limitations⁵ is pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the action first accrued to the testator, and not from the time of proving the will.

i Sawyer v. Mercer, 1 T. R. 690.

k Rede v. Berelocke, Yelv. 59.

l Trethewy v. Ackland, 2 Saund. 49.

m Per Lawrence J. in Meux q. t. v. Howell, 4 East, 10.

n Hickman v. Walker, Willes, 27.

(43) Saunders observes, that this is an anomalous case, and against the rules of law, which condemn double pleading, but admits that it has been allowed in this particular case several times, and cites Turner's case, 8 Rep. 132, 3. and Tresham's case, 9 Rep. 108. So Serjeant Williams, in 1 Saund. 337. b. n. (2). "This is an anomalous case, in which the plaintiff is permitted to reply to every judgment, or some of them, without being guilty of duplicity, omitting the rest; but the better way seems to be to answer such judgment only as the plaintiff knows to be obtained by fraud."

But where money belonging to the estate of an intestate is received by A. after the death of the intestate, and more than six years afterwards B. takes out an administration, it seems that the time of limitation must be computed from the day on which the letters of administration were granted (44); and, consequently, if B., within six years from that day, brings an action for money had and received against A., the statute of limitations will not operate as a bar (45).

As to the proper mode in which an executor of an executor should frame his plea, the following case deserves attention:

Plaintiff, assignee of lessee for years, sued the defendant as executor of B., executor of A., the lessor in covenant upon the original indenture of lease, for a breach of the covenant for quiet enjoyment by A., and since his decease by defendant. Defendant pleaded, that he had fully administered all the goods of A., the first testator. On demurrer, it was holden, that the plea was bad, inasmuch as it only gave an answer to one part of a case which pointed at two kinds of misapplication of those funds which were liable to the plaintiff's demand. Le Blanc J. observed, that the defendant might discharge himself in two ways; either by shewing that the first executor fully administered all the goods and chattels of A. which came to his hands, and that

• *Curry v. Stephenson*, Carth. 325.
Skinn. 555. S. C. See the record,
4 Mod. 372.

p *Wells v. Fyde*, 10 East, 315.

(44) "For before administration granted, there was not any person who could claim it, and the statute begins to operate only from the time a right to demand the thing in question vests in some person." Per Gwillim, 4 Bac. Abr. 479.

(45) I have stated this position with an *ut videtur*, because the principal question in *Curry v. Stephenson*, and on which alone the decision of the court was pronounced, was, whether the plaintiff ought not to have concluded his replication with a verification, instead of concluding to the country. The opinion on the statute of limitations, as stated in the text, was, according to Carthew, expressed by Holt C. J. who relied on *Standford's case*, cited in *Saffin's case*, Cro. Jac. 60, 61. and 5 Rep. 123. where a similar question was decided on the statute of fines. It may be observed, that the same question upon the statute of limitations arose and was argued in *Nunn v. Wilsmore*, 8 T. R. 521. but the circumstances of that case rendered it unnecessary for the court to decide it; the position in the text, therefore, stands on the single authority of Chief Justice Holt.

the defendant, since the death of the first executor, has duly administered all that he has received of A.'s assets; or he might shew that he has received no assets of the first executor. But, as the plea now stands, he leaves unanswered every thing respecting the assets of the first testator which came to the hands of his executor, and merely answers as to his own application. Bayley J. added, that the plaintiff was entitled to recover his debt in either of two events; if the defendant had received assets of the original testator, and had not properly applied them; or if the defendant had received assets of the first executor, and the first executor had received assets of his testator, and had not duly applied them. The defendant has only answered as to one of those events; but the plaintiff may be entitled to satisfaction out of both funds; and, therefore, he is entitled to have the issue so framed that if any thing be forthcoming to him out of either fund, he may be able to avail himself of it.

See further as to pleading the statute of limitations, and statute of set-off, by and against executors, *ante tit. Assumpsit*, and *tit. Debt*.

Of the Right of Retainer.—A lawful executor or administrator, when sued by a creditor of the deceased, may claim a right of retaining the assets in satisfaction of a debt due to himself, provided such debt is equal or superior in degree to that claimed by the creditor (46).

Where an action is brought against a defendant as *executor* (which is the case, as well where the defendant is charged as rightful executor, as when he is charged as executor *de son tort*), and he claims to retain as executor or administrator, he ought to set forth the letters testamentary, or the letters of administration, in order that it may appear to the court, that he is such a person as is entitled to retain; for an executor *de son tort* is not so entitled¹.

But where the plaintiff sues the defendant as *administrator*, and he claims to retain as administrator, it is not ne-

q 1 Keb. 285. 2 Vent. 180. Sty. 337. s Caverly v. Ellison, T. Jones, 23.

Vaughan v. Brown, post, p. 729. t Coulter's case, 5 Rep. 30. Yelv. 138.

r Atkinson v. Rawson, 1 Mod. 208.

(46) In *Rockelley v. Godolphin*, 2 Show. 403. and *T. Raym.* 483: the court inclined to think, that an administrator might plead, to an action of debt on bond, a retainer in satisfaction of a bond conditioned for the payment of money to *trustees* for the use of the administrator.

cessary that the letters of administration should be set forth, because the plaintiff, by his declaration, admits him to be lawful administrator^a.

An executor *de son tort* cannot retain for his own debt, although of a superior nature; neither will the consent of the rightful administrator to the retainer given, after action brought by creditor, alter the case^x; nor can such executor avail himself of a delivery over of the effects of the deceased to the rightful administrator after action brought, and before plea pleaded, so as to defeat the action of a creditor (47).

In debt upon bond against the defendant as executor^y, he pleaded a judgment which he had recovered against the deceased, and so justified by way of retainer. Replication,

^a Picard v. Brown, 6 T. R. 550. ^y Vaughan v. Brown, Str. 1106. Andr.
^x Vernon v. Curtis, 2 H. Bl. 18. 3 T. R. 328. 7 Mod. 274. Leach's ed. and
R. 587. MSS.

(47) "When trover is brought by a *rightful executor or administrator* against an executor *de son tort*, he cannot plead payment of debts, &c. to the value, or that he has given the goods, &c. in satisfaction of the debts, because no person ought to obtrude himself upon the office of another; nevertheless, upon the general issue pleaded, such payments shall be recouped in damages." Per Holt C. J. Carth. 104. So per Buller J. 2 T. R. 100. "If an action be brought by a *rightful administrator* against an executor *de son tort*, whatever may have been disposed of in a course of administration, as by paying debts, &c. *shall be allowed him in damages.*" "But in an action *by a creditor* against an executor *de son tort*, the defendant may *plead* plene administravit, and give in evidence the payment of just debts; but he cannot retain a just debt to himself." Per Holt C. J. Carth. 104.

It is laid down in Bull. N. P. 48. "that if, in *trover*, by a *rightful administrator*, it should appear, that the payments made by the executor *de son tort* amount to the full value of the assets, the plaintiff shall be nonsuited; but in *trespass* it shall go in mitigation of damages only." This position is founded, as it seems, on an expression in 12 Mod. 472. ascribed to Holt C. J.; but as Lord Ellenborough, in Mountford v. Gibson, 4 East, 443., justly remarked, it is directly contrary to the opinion of Holt C. J. in Whitehall v. Squire, Carth. 104. The acknowledged accuracy of Carthew's Reports may induce a suspicion that the reporter in 12 Mod. was mistaken; more especially as in p. 472. of that report, Holt is made to contradict what he had asserted in p. 471. Indeed there does not appear any reasonable ground of distinction between the actions of *trespass* and *trover*, as to this point.

that the defendant was executor *de son tort*. Rejoinder, that after the last continuance, the defendant had obtained letters of administration. On demurrer, it was objected, that the rejoinder was a departure from the plea. But the court held that it was well enough; because the plea did not expressly admit, that defendant had proved the will, but only admitted the defendant's executorship according to the declaration. By the replication it appeared, that the defendant was not charged as a rightful but as wrongful executor, which could not appear on the declaration, the method of declaring against both of them being the same. And the rejoinder set forth a matter, which made the acting as unlawful executor justifiable; for the subsequent administration related to the death of the intestate, and purged the precedent wrongful executorship, so as to give the defendant the benefit of retaining.

Evidence.—In all questions respecting *personalty* the probate or letters of administration, with the will annexed, are the only legal evidence of the will.

Trespass for taking goods^a. On not guilty, the defendant admitted that the goods had been in the possession of the plaintiff, but insisted that he, the defendant, had a property in them as executor of I. S. and produced the original will, by which he was appointed executor. But, per Raymond C. J. "I cannot allow the original will to be evidence to prove a property in an executor; *the probate must be produced*; for, perhaps, the ecclesiastical court will not allow this to be the testator's will. Besides, until probate, a man dies intestate; and, if the executor dies before probate, his executor shall not be executor to the first testator."

Where a probate of a will is lost, the ecclesiastical court never grants a second probate, but they will exemplify the first, and such exemplifications are admissible in evidence^a.

A retainer may be given in evidence on plene administration^b; but debts of a higher nature subsisting cannot^c.

In an action at the suit of an executor, if the estate of the testator is insolvent, a person who has an unsatisfied demand upon such estate, is not a competent witness for the plaintiff^d.

Upon *plene administravit et issint riens inter mains*^e, if it

^a *Coe v. Westernham*, Norfolk Summ. Ass. 1795. Serjt. Leeds' MS.

^b Per Cur. in *Shepherd v. Shorthose*, Str. 413.

^c *Plumer v. Marchant*, 3 Burr. 1380.

^c Bull. N. P. 141.

^d *Craig v. Cundell*, 1 Camp. N. P. C. 381.

^e 1 Inst. 283. a.

be proved, that executor hath goods in his hands, which were the testator's, he may give in evidence, that he hath paid to that value of his own money, and need not plead it specially.

In case against executor, upon *plene administravit*^f, the plaintiff must prove his debt, otherwise he shall recover but 1d. damages, though there be assets; for the plea admits the debt, but not the amount.

Judgment.—On a plea of *plene administravit* generally, by an executor^g, the plaintiff may immediately take judgment of assets *quando acciderint* (48). In debt or *scire facias* on this judgment, evidence of such assets only as have come to the executor's hands since the judgment will be received^h.

Judgment against an executor, in covenant broken by himself, shall be *de bonis testatoris*; for it is the testator's covenant which binds the executor as representing him; and therefore he must be sued by that nameⁱ.

In like manner upon an obligation made by testator for the performance of covenants, judgment in debt on the bond for a breach of covenant by executor, shall be *de bonis testatoris*^k.

So in debt against an executor on a bond made by testator^l, if the defendant plead *non est factum*, and it is found against him, judgment shall be for the debt and damages *de bonis testatoris*; for the executor cannot know whether it be the deed of the testator or not (49).

In debt on bond against an executor, if the defendant plead "fully administered," and any assets are found in his hands, although they be not to the value of the debt, yet the plaintiff shall have judgment for his whole debt *de bonis testatoris*^m.

In debt against two executorsⁿ, if they plead severally by

^f Per Holt C. J. *Shelley's case*, Salk. 296.

^g *Noell v. Nelson*, 2 Saund. 226.

^h *Taylor v. Holman*, Bull. N. P. 169.

ⁱ *Collins v. Throughgood*, Hob. 122.

^k *Castilion v. Executor of Smith*, Hob. 222.

^l Bro. Abr. Exor. pl. 109.

^m *Lee v. Ridford*, adjudged on error, in Exch. Ch. 1 Roll. Rep. 58.

ⁿ *Bellew v. Jackleden*, on error in Exch. Ch. 1 Roll. Abr. 929. (B.) pl. 5.

(48) See the form of this judgment in 2 Saund. 216, 217.

(49) But see *Harrison v. Beccles*, cor. Ld. Mansfield C. J. London sittings, 1769, cited in *Erving v. Peters*, 3 T. R. 688.

several attorneys "fully administered," and the jury find that the one has assets and the other has not, the judgment shall be against him only who is found to have assets, and the other shall go quit.

Where the cause of action is such, that the executor might have declared in his own right, he is liable for costs, if he is nonsuited^a.

^a *Grimstead v. Shirley*, 2 Taunt. 116.

C H A P. XX.

FACTOR.

Of the Nature of the Employment of a Factor—Power and Authority—Lien—Liability of Principal—Evidence.

OF the Nature of the Employment of a Factor.—A factor or broker is an agent, who is commissioned by a merchant or other person to sell goods for him, and to receive the produce. Foreign factors are agents residing here, commissioned by merchants resident abroad, or the contrary. Home factors are agents resident in England, commissioned by merchants also resident in England.

A factor is usually paid for his trouble, by a commission of so much *per cent.* on the goods sold. But sometimes he acts under a *del credere* commission (1), in which case, for an additional premium beyond the usual commission, he

(1) "*Del credere* is an Italian mercantile phrase, which has the same signification as the Scotch word *warrantice*, or the English word *guarantee*. A factor who has *general* orders to dispose of goods for his principal to the best advantage, is bound to exercise that degree of diligence which a prudent man exercises in his own affairs, and consequently the factor is authorized to dispose of the goods according to the best terms which can be obtained at the time; and if it shall appear that he has done so, and that he has sold the goods to persons in reputed good circumstances at the time, and to whom at that time he would have given credit in his own affairs, he will not be liable to his principal, although some of these should fail; and for such trouble the factor is generally paid by a commission of so much *per cent.* upon the goods sold. According to the above practice, the principal runs all the risk, and the factor is sure of his commission whether the event be favourable or not. Many merchants do not choose to run this risk, and to trust so implicitly to the prudence and discretion of their factor; and, therefore, the agreement called *del credere* was invented, by which the factor, for an additional premium beyond the

undertakes for the credit of the persons to whom he sells the goods consigned to him by his principal.

Power and Authority.—A factor, as such, has not any authority to pledge, but only to sell the goods of his principal^a. Hence, if a factor pledge the goods of his principal, the latter may recover the value of them in trover, against the pawnee, on tendering to the factor what is due to him, without making any tender to the pawnee^b (2).

The same rule holds with respect to a bill of lading which has been endorsed to a factor by his principal; for the bill of lading, which is the symbol of the delivery of possession, cannot give a factor a greater authority than the actual possession of the goods themselves. Hence, as a factor cannot pledge the goods of his principal^c, by a delivery of the goods, so neither can he do it by an endorsement and delivery of the bill of lading; for, although the endorsement of a bill of lading gives the endorsee an irrevocable right to receive the goods, where it is intended as an assignment of the property in the goods, yet it will not have that operation, where it is intended as a deposit only, by a person, who is not authorised to make such deposit (3).

a *Paterson v. Tash*, Str. 1178, per Lee C. J.

b *Daubigny v. Duval*, 5 T. R. 604.
c *Newsom v. Thornton*, 6 East, 17.

usual commission, when he sells his goods on credit, becomes bound to warrant the solvency of the purchasers." Arg. *Mackenzie v. Scott*, 6 Bro. P. C. 287. Tomlin's ed.

In *Grove v. Dubois*, 1 T. R. 112. the effect of a commission *del credere* was discussed in the Court of King's Bench, and that court decided, that it was not merely a conditional undertaking and guarantee from the person taking it, that he would pay if some other person did not, but that it was an absolute engagement from him, and made him liable in the first instance; and the same doctrine was acquiesced in, and acted upon in *Bize v. Dickason*, 1 T. R. 285. Hence, where a factor, under a commission *del credere*, sold goods, and took accepted bills from the purchasers, which he endorsed to a banker at the place of sale, and having received the banker's bill (payable to the factor's order) on a house in London, endorsed and transmitted it to his principal, who got it accepted; it was holden, that on the failure of the acceptor and drawer of this bill, the factor was answerable for the amount. *Mackenzie v. Scott*, 6 Bro. P. C. 280. Tomlin's ed.

(2) Where a factor *pledges* the goods of his principal as his own, the pawnee cannot claim to retain against the principal for the amount of the factor's general lien at the time of the pledge. *M. Combie v. Davies*, 7 East, 5.

(3) In the case cited (c), as an authority for this position, the party to whom the factor had pledged the bill of lading, had not

Where goods are permitted to remain at a wharf in the name of a broker, who is accustomed to deal in the article, and the broker *sells* them, the principal will be bound by such sale, although he did not expressly authorize the broker to sell^d.

A factor may sell on credit^e, although not particularly authorized by the terms of his commission so to do (47).

Factors may be bankrupts^f.

By stat. 31 Geo. 2. c. 40. s. 11. Factors, employed to buy or sell cattle by commission, are prohibited from buying either directly or indirectly, on their own account, (except for the necessary use of their families) live cattle, sheep, or swine, in London, or within the bills of mortality, or at any place whilst the cattle are on the road to London for sale; and, by the same clause, such factors are prohibited from selling, either by themselves or their agents, such cattle, &c. in London, or within the bills of mortality. Penalty,

d *Pickering v. Busch*, B. R. H. 52 G. 3. f Stat. 5 G. 2. c. 30. s. 39.
e Per Willes, C. J. Willes, 406. Per
Chambre J. 3 Bos. & Pul. 439.

any notice that he was dealing with a factor; the endorsement by the principal was a general endorsement: but it was observed, by Lawrence J., that the letter of advice which brought the bill of lading might have been inquired for, and that would have shewn, that the person who pledged the bill was factor only, and not vendee of the goods.

(4) "It has been objected, that a factor, by virtue of a general authority, cannot sell on credit; if he do so, it is at his own risk, and the owner is not obliged to accept the vendee as his debtor; and it does not in the present case appear that he had any special authority. And for this purpose several passages were cited out of the civil law books as to the nature of a factor. To this I shall answer, that the nature of dealing is now quite altered, of which the courts of law must take notice; for constant and daily experience shews, that factors do sell upon credit without such a special authority. If it were otherwise, it would be the greatest prejudice to trade; and we ought always, and as much as we can, and as far as is consistent with the rules of law, to do every thing for promoting the trade and commerce of the nation." Per Willes C. J. delivering the opinion of the court in *Scott v. Surman*, Willes, 406, 7. N. "An agent employed generally, to do any act, is authorized to do it only in the usual way of business. Hence, as stock is sold usually for ready money only, a broker employed to sell stock cannot sell it upon credit, without a special authority, although acting *bona fide*, and with a view to the benefit of his principal." Lord Ellenborough, C. J. *Wiltshire v. Sims*, 1 Camp. N. P. C. 258.

double the value of the cattle sold; to be recovered by application to J. P., one moiety to prosecutor, and the other to the poor of the parish where the offence was committed.

When goods are consigned to joint factors^g, they are in the nature of co-obligors, and are answerable for one another, for the whole.

According to the general rule of law, a sale by a factor creates a contract between the owner and buyer^h; and this rule holds even in cases where the factor acts upon a *del credere* commission. Hence, if a factor sell goods, and the owner gives notice to the buyer to pay the price to him and not to the factor, the buyer will not be justified in afterwards paying the factor; and the owner will be entitled to recover the price in an action against the buyer, unless the factor has a lien on such priceⁱ.

If goods are bought by a broker^k, who does not mention the name of his principal until he (the broker) has become insolvent, the principal cannot set off the price of the goods against a debt due to him from the broker, but is still liable to the vendor.

But where a factor acting under a *del credere* commission^l, sells goods as his own, and the buyer does not know of any principal, the buyer may, in an action brought against him by the principal, set off a debt due to him from the factor (5).

Goods sold by a broker for a principal not named, upon the terms, as specified in the usual bought and sold notes,

^g Godfrey v. Saunders, 3 Wils. 114.

^h Per Lee C. J. in Scrimshire v. Alderton, London Sitings, Str. 1132. where the jury, however, found a verdict against the opinion of the judge. See also exp. Murray, Co. B. L. 379. 5th ed.

ⁱ See Drinkwater v. Goodwin, Cowp. 251.

^k Waring v. Favenck, 1 Camp. N. P. C. 85.

^l George v. Claget, 7 T. R. 359.

(5) Where a factor to a person beyond sea buys or sells goods for the principal in his own name, an action will lie against him or for him, in his own name; for the credit will be presumed to be given to him in the first case, and in the last the promise will be presumed to be made to him, and the rather so, as it is so much for the benefit of trade. *Gonzales v. Sladen*, T. 1 Ann. London sitings, Salk. MSS. Bull. N. P. 130. "Where the principal resides abroad, he is presumed to be ignorant of the circumstances of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties." Per *Chambre J.* in *Houghton v. Matthews*, 3 Bos. & Pul. 490.

(delivered over to the respective parties by the broker) of "payment in one month, money," may be paid for by the buyer to the broker within the month, and that payment may be made by a bill of exchange accepted by the buyer and discounted by him within the month, although such bill has a longer time to run before it become due^m.

Lien.—By the general usage of trade, where there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he has a lien (6) on all goods in his hands for such balance of the general account, without regard to the time when, or on what account he received the goodsⁿ (7).

With respect to this general lien, it is to be observed,

First, That it will not attach until the goods come into the possession of the factor^o.

Secondly, The lien exists during such time only as the factor has possession of the goods; for if he should part with the possession after the lien has attached, the lien is gone^p.

It is to be observed, however, that where a factor is in advance for goods by actual payment, or where he sells under a *del credere* commission, whereby he becomes responsible for the price, he has a lien on the price, although he should have parted with the possession of the goods^q.

And this rule holds, although money should have been

^m Favenc v. Bennett, 11 East, 26.

ⁿ Kruger v. Wilcox, Ambli. 252. Gardiner v. Coleman, cited 1 Burr. 494.

and per Buller J. 6 East, 28. n. S. P.

^o Kinloch v. Craig, 3 T. R. 119 783.

^p See Sweet v. Pym, 1 East, 4. and Buller J. in Lickbarrow v. Mason, 6 East, 27. n.

^q See Drinkwater v. Goodwin, Cowp. 251.

(6) "There are two species of liens known to the law, namely, particular liens and general liens. Particular liens are, where persons claim a right to retain goods in respect of labour, or money expended on such goods; and those liens are favoured in law. General liens are claimed in respect of a general balance of account; and those are founded in custom only, and are therefore to be taken strictly." Per Heath J. 3 Bos. & Pul. 494.

(7) "That a factor has a lien for his general balance is a point too well established to be disputed. The general principle upon which such lien has been allowed, seems to be for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors." Per Chambre J. in Houghton v. Matthews, 3 Bos. & Pul. 488, 9. N. This lien is an insurable interest. Park's Ins. 11.

advanced by the factor, at the time when he knew that the principal was in insolvent circumstances^r.

But where a factor has not any special claim on the goods, and he has disposed of them, whereby he has lost the advantage arising from possession, the debt is to be considered as the debt of the principal, and the factor has no lien on the price.

The plaintiff, who was resident in Ireland, employed two persons, as his factors in London, to sell goods for him; which he had sent to them^s. The factors sold these goods to J. S. for a certain sum; the plaintiff not knowing to whom they were sold, and J. S. not knowing that they belonged to the plaintiff, the goods having been delivered to him as the goods of the factors. The factors, before payment, became bankrupts, and their debts were assigned by the commissioners to the defendant, who afterwards received from J. S. the money for the goods. The plaintiff having brought an action against the defendant for money had and received, the case was reserved by Holt C. J. for the opinion of the Court of King's Bench, who gave judgment, after argument, for the plaintiff. This case was afterwards cited before Parker C. J. at the London Sittings, and allowed to be law; because, though it was agreed, that payment by J. S. to the factors, with whom the contract was made, would have discharged J. S. as against the principal, *yet the debt was not in law due to the factors, but to the person whose goods they were*; and therefore, it was not assigned to the defendant, by a general assignment of their debts, but remained due to the plaintiff as before; and having been paid to the defendant, who had not any right to have it, it must be considered in law as paid for the use of him to whom it was due; and, consequently, an action might be maintained by him as for money had and received to his use.

The plaintiffs, who were partners, resident beyond sea, consigned a quantity of tar to R. S., the bankrupt, brother of one of the plaintiffs, as their factor^t. There had been mutual dealings between the two brothers, the accounts of which were then unsettled. The ship and goods arrived in the Thames, from Carolina. The factor, having received the bill of lading, sold the tar to J. S., upon an agreement

^r Foxcroft v. Devonshire, 2 Burr. 931.

^s Gurrat v. Callum, T. 9 Ann. B. R. stated by Willes C. J. delivering the opinion of the court in Scott v. Surman, Willes, 405.; reported also in

Bull. N. P. 42; ed. 6th, by the name of Garvat v. Callum.

^t Scott and another v. Surman (and others, assignees of R. S. a bankrupt, Willes, 400.

that it should be paid for in promissory notes, payable four months after the delivery of the goods. A few days after the sale, the vendee gave the factor, in part payment, two promissory notes. Soon afterwards the factor committed an act of bankruptcy, and the defendants were chosen assignees under the commission. The bankrupt delivered up the two notes to the assignees, and they received the money due upon them. They likewise confirmed the sale, and settled the account with the vendee, and received the balance. An action for money had and received having been brought by the plaintiffs against the assignees, for the recovery of the money received on the notes, and the money received on the settlement of the account, it was holden, that the plaintiffs were entitled to recover both sums; Willes C. J. (who delivered the opinion of the court) observing, as to the first, that the notes, having been in the hands of the bankrupt at the time of his bankruptcy, were capable of being distinguished from the rest of the bankrupt's estate, and therefore could not be applied to the bankrupt's debts; consequently the plaintiffs were entitled to recover the value of those notes which had been received by the defendants; in like manner as if the goods had remained in specie, unsold in the bankrupt's hands at the time of the bankruptcy, the plaintiffs might have recovered them in an action of trover. As to the second sum, the general rule was, that if a person received money, which ought to be paid to another, an action would lie as for money had and received; that the assignees having received the money which belonged to the plaintiffs, they ought to have paid it to the plaintiffs, and not having done so, this action would lie against them for so much money had and received to the use of the plaintiffs.

Thirdly, A factor has not a lien in respect of debts which have accrued previously to the time at which his character of factor commenced.

A., a factor, sold the goods of B., in his own name, to C.; C., without paying for these goods, sent another parcel of goods to A. to sell for him, not having employed A. as a factor before. C. became bankrupt, and his assignees claimed the goods sent by C. to A., which still remained unsold, tendering the charges upon those goods. A. refused to deliver them, claiming a lien upon them for the price of the former goods sold by him to C., the balance between A. and B., being in favour of A. An action of trover having been brought by the assignees, against A., for the value of the

^a *Houghton v. Matthews*, per Heath, Rooke, and Chambre Js, Alvanley C. J. dissentiente. 3 Bos. & Pul. 485.

goods sent by C., it was holden, that they were entitled to recover.

Liability of Principal.—The maxim, that the principal is *civilly* responsible for the acts of his agent, universally prevails both in courts of law and equity^x.

Upon this principle it was holden, by Holt C. J., that a merchant was answerable for the deceit of his factor, who had sold some silk to the plaintiff, as silk of a superior quality, knowing it to be silk of an inferior quality^y (8).

Evidence.—It is a general rule of evidence, that where a witness has a direct interest in the event of a cause, his testimony cannot be received. But, from necessity, an exception has been introduced in the case of factors and brokers, because, from the nature of the transaction in which they are engaged, the contracts they make for other persons cannot be proved without them. Hence, it has been holden^z, that a factor is a good witness to prove the contract of sale, in an action by the principal, for the price of the goods sold. And, in a late case^a, it was determined, that there was not any difference, in point of interest, between a person who sells upon commission, and one who is to have a share of the profit; and, consequently, that a person who was employed to sell goods, and was to receive for his trouble whatever money he could procure for them beyond a stated sum, was a competent witness to prove the contract between the seller and buyer (9).

x 4 T. R. 66. per Kenyon C. J.

y *Hera v. Nichols*, Salk. 289. Per Holt C. J. at Nisi Prius.

z *Dixon v. Cooper*, 3 Wils. 40.

a *Benjamin v. Porteus*, 2 H. Bl. 590. per Heath and Rooke Js.

(8) But see 9 H. 6. 53. b. cited in Bro. Abr. Actions sur le case, pl. 8. where it was said by the court, if my servant sell false stuff, an action on the case does not lie against me, unless he sold it through my covin or by my command.

(9) Eyre C. J. differed from the two judges, conceiving that "this was not simply a contract that the witness made for another, but for another and himself. His profit was not to arise from the profit of the principal, but was collateral to and beyond it. He could not wrong the principal, but he might wrong the person with whom he dealt, by screwing him up beyond the real value of the goods, for the sake of his own profit, and therefore he had a *separate* interest to establish a particular contract." The C. J. admitted; however, that, if the principle upon which the two judges relied, viz. there was not any difference in point of interest between a person who sold upon commission, and one who was to have a share of the profit, could be supported, the evidence ought to be received.

CHAP. XXI.

FISHERY.

- I. *Of the Right of Fishing in the Sea, and in the
Creeks and Arms thereof, and in fresh Rivers.*
II. *Of the different Kinds of Fishery—Several Fishery
—Free Fishery—Common of Fishery.*
-

I. *Of the Right of Fishing in the Sea, and in the Creeks
and Arms thereof, and in fresh Rivers.*

“THE right of fishing in the sea^a, and the creeks and arms thereof, is originally lodged in the crown, in like manner as the right of fishing in a private or inland river is originally lodged in the owner thereof. But although the king is the owner, and as a consequent of his property, hath the primary right of fishing in the sea, or creeks or arms thereof, yet all the king's subjects in England have regularly a liberty of fishing in the sea, and the creeks and arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers, where the king, or some particular subject, hath gained a propriety exclusive of that common liberty, either by the king's charter or grant, or by custom and usage, or prescription.” It appears from this passage, that Lord Hale thought an exclusive right of fishery in an arm of the sea might belong to a subject^b. And of this opinion were the Court of B. R. in *Carter and another v. Murcot and another*, 4 Burr. 2162. where it was decided, that a plea, which prescribed for a several fishery in an arm of the sea, was good; but it was there said, that, as the presumption in such case was in favour of the king

^a *Ld. Hale, De jure maris*, p. 1. c. 4. *Hargrave's Tracts*, vol. 1. p. 11. See also the case of the Royal Fishery of the Banne, *Dav. R.* 55.

^b See also 8 Ed. 4. 19. a. 4 T. R. 437. S. P. admitted by *Kenyon C. J.* and *Ashurst J.*

and the public, it was incumbent on the plaintiff to prove his exclusive right, agreeably to the rule laid down by Lord Hale, in 1 Mod. 105. that if any one will appropriate a privilege to himself, the proof lies on his side. In *Ward v. Creswell*, Willes Rep. 265. and 16 Vin. Abr. 354. tit. Piscary (B.) S. C. the court held, that all the subjects of England, of common right, might fish in the sea, it being for the good of the commonwealth, and for the sustenance of the people of the realm, and that therefore a prescription for it as appurtenant to a particular township was void, and as absurd as a prescription would be for travelling the king's highway, or for the use of the air as appurtenant to a particular estate.

To trespass for fishing in the plaintiff's fishery^c, defendant pleaded, that the place is an arm of the sea, in which every subject has a right to fish; the plaintiff in his replication claimed an exclusive right by prescription, traversing the general right. It was holden, that the defendant ought to take issue on the traverse, and ought not to traverse the prescriptive right claimed by the plaintiff; for the first traverse was a material one, and would put in issue the true question in dispute between the parties.

In *Bagott v. Orr*, 2 Bos. & Pul. 472. the court seem to have been of opinion, that *primâ facie* every subject has a right to take fish found on the sea shore between high and low water mark, but that such general right might be restrained by an exclusive right in an individual.

Fresh rivers, of what kind soever, of common right belong to the owners of the soil adjacent^d; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquæ*, and the owners of the other side the right of soil or ownership, and fishing unto the *filum aquæ* on their side. And if a man be owner of the land on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length.

^c *The Mayor, &c. of Orford v. Richardson*, 4 T. R. 437. ^d Lord Hale, *De Jure Maris*, p. 1. c. 1. Hargrave's Tracts, vol. 1. p. 5. Davis's R. 57. a. b.

II. Of the different Kinds of Fishery—Several Fishery —Free Fishery—Common of Fishery.

A *several* fishery is where a person has an exclusive right of fishery, either in his own soil, or in the soil of another^e (1).

He who has a several fishery is not necessarily the owner of the soil^f; but as the exclusive right of fishing is an incident to the ownership of the soil, it will be presumed, until the contrary be shewn, that such right resides in the owner of the soil. Hence, to an action of trespass for an injury to a right of several fishery, it is a good plea that the soil and freehold belong to defendant^g (2). To this, however, the plaintiff may reply title to the several fishery, either by prescription or grant, thereby rebutting the presumption of the right of several fishery being still vested in the owner of the soil.

If a person be seized of a river^h, and by deed grant a several fishery in the same, and makes livery of seisin *secundum formam carta*, the soil does not pass; and if the river become dry, the grantor may take the benefit of the soil, for a particular right only passed to the grantee.

A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manorⁱ. A right of

^e Fitz. Abr. Barre, pl. 27. cites M. 20 H. 6. 4.

J. 18 H. 6. 30. a. Fitz. Abr. Barre, pl. 20. S. C.

^f Hargrave's Note, Co. Lit. 122. a. n. (7).

h 1 Inst. 4. b.

^g 17 E. 4. 6. b. 18 E. 4. b. Per Paston

i Rogers v. Allen, 1 Camp. N. P. C. 309.

(1) "In order to constitute a *several* fishery, it is requisite that the party claiming it should so far have the right of fishing independently of all others, as that no person should have a co-extensive right with him in the object claimed. But a partial independent right in another, or a limited liberty, does not derogate from the right of the general owner." Per Lord Mansfield C. J. delivering the resolution of the court, Seymour and others v. Ld. Courtenay and others, 5 Burr. 2814.

(2) See also 10 H. 7. 24. b. 28. b. a case very clearly reported; but it is said there, that the plea is not good, unless it conclude with praying, *whether plaintiff shall have his action without shewing title*. Per Brian J. but in 20 H. 6. 4. a. Newton C. J. C. B. was of opinion, that the plea might be concluded either way.

fishery is divisible, and may be abandoned as to part, while another part is preserved. Hence, an exclusive right to dredge for oysters may subsist as appurtenant to a manor, although it be lawful for all the king's subjects to catch floating fish therein.

Trespass for breaking and entering his close, and fishing in *separali piscariâ suâ*, and for taking *pisces suos*^k. After verdict, exception was taken to the declaration in arrest of judgment, because it is said *pisces suos*. But the court were of opinion, that being in *separali piscariâ*, it might well be said *pisces suos*, because they could not be taken by any other person.

In *Fontleroy v. Aylmer*, *Ld. Raym.* 239. where the declaration stated that defendant, in *separali suâ piscariâ piscatus fuit, et pisces cepit*, after verdict for plaintiff, an exception in arrest of judgment, directly the reverse of that in the foregoing case, was taken, viz, that the declaration had omitted the word *suos*; but the court thought the objection entitled to very little weight; because the plaintiff having alleged, that it was his fishery, the fish there should be intended *præ facie* to be his fish.

Issue being joined upon a prescription for the sole and exclusive right of fishing over four places in a navigable river^l, proof of a right of fishing over three of the four places was holden not to support the right claimed; although it appeared that the trespasses complained of were committed in one of the three places over which the right was shewn to exist.

Free Fishery.

It is to be lamented, that the books do not afford materials for an accurate description of a free fishery. That this subject is involved in doubt and uncertainty, will appear from the following passages, extracted from the writings of Mr. Justice Blackstone and Mr. Hargrave.

Mr. J. Blackstone, having defined common of fishery to be a liberty of fishing in another man's water^m, states a free fishery to be an exclusive right of fishing in a public river, and adds, "that it is a royal franchise, and is considered as such in all countries where the feudal polity has prevailed;

^k *Child v. Greenhill*, *Cro. Car.* 553.
Sir Win. Jones, 440. S. C.

^l *Rogers v. Allen*, 1 *Camp. N. P. C.* 309.

^m 2 *Bl. Com.* 39, 40. Ed. 12.

though the making such grants, and thereby appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter; and the rivers that were fenced in his time were directed to be laid open. This opening was extended by the second and third charters of Henry III. to those also which were fenced under Richard I., so that a franchise of free fishery ought to be as old as the reign of Henry II. This differs from a *several* fishery, because he that has a *several* fishery must also be (or at least derive his right from) the owner of the soil, which in a free fishery is not requisite. It differs from a common of piscary, in that the free fishery is an *exclusive* right; the common of piscary is not so; and therefore, in a free fishery, a person has a property in the fish before they are caught; in a common of piscary, not until afterwards. Some, indeed, have considered a free fishery, not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor. But the considering such right as originally a flower of the prerogative, till restrained by Magna Charta, and derived by royal grant, previously to the reign of Richard I., to such as now claim it by prescription, and to distinguish it, as we have done, from a *several* and a *common* of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed."

On this passage Mr. Hargrave made the following remark: "Both parts of this description of a free fishery seem disputable. With regard to the first part, though for the sake of distinction it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers by derivation from the crown; and though in other countries it may be so considered, yet, from the language of our books, it seems as if, in our law, practice had extended this kind of fishery to all streams, whether private or public; neither the register nor other book professing any discrimination. Reg. 95. b. F. N. B. 88. G. Fitz. Abr. Ass. 422. 17 E. 4. 6. b. 7. a. 7 H. 7. 13. b. With respect to the 2d part, it is true, that in *Smith v. Kempe*, 2 Salk. 637. Carth. 285. S. C. the court held free fishery to import an exclusive right equally with several fishery, chiefly relying on the writ in the Register 95. b. and the 46 E. 3. 11. a. But then this was only the opinion of two judges against one, who strenuously insisted, that the word

n Hargrave's Co. Litt. 122. a. n. 7.
 o Holt C. J. Dolben J.

p Eyre J.

libera, ex vi termini, implied common, and that many judgments and precedents were founded on Lord Coke's so construing it. That the dissenting judge was not wholly unwarranted in the latter part of his assertion, appears from two determinations a little before the case in question, viz. *Upton v. Dawkins*, 3 Mod. 97, where judgment was arrested in trespass for breaking and entering a free fishery; because the declaration alleged the fish taken to be the fish of the plaintiff: and *Peake v. Tucker*, cited in margin, Carth. 286. where judgment was arrested on the same ground."

After the preceding remarks were published, Mr. J. Blackstone, with that candour and liberality, which are the inseparable companions of true learning, added the following observation in a subsequent edition of his Commentaries: "It must be acknowledged, that the rights and distinctions of the three species of fishery are very much confounded in our law books; and that there are not wanting respectable authorities (see them well digested in Hargrave's notes on Co. Litt. 122. (23),) which maintain that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with common of piscary."

Whatever be the nature of free fishery, whether it be, as Mr. J. Blackstone supposes, an exclusive right, or as Mr. Hargrave seems to think, only the same with common of fishery; since the case of *Smith v. Kempe*, before mentioned, it is too late now to contend, that an action of trespass *vi et armis* will not lie for an injury to it (3). But it may admit of a question, whether the declaration ought to state the fish taken to be the fish of the plaintiff. It seems, that such allegation ought not to be made.

If an issue taken on a prescription by defendant goes to the whole trespass, such issue being found for the defendant, the plaintiff will not be entitled to costs, although a verdict be found for him on the general issue³.

q *Vivian v. Blake*, 11 East, 263.

(3) It should be remarked, however, that the declaration in *Smith v. Kempe*, was for breaking and entering the close of the plaintiff, and fishing in the free fishery of the plaintiff in the said close. See Carthew's Rep. p. 285.

Common of Fishery.

* A common of fishery is a right of fishing in common with other persons in a stream or river, the soil whereof belongs to a third person. This does not differ in any respect from any other right of common^r, and trespass will not lie for an injury to it.

Under ancient deeds recognising a right in the owner of an estate to have a weir across a river for taking fish^s, if it appear that such weir was heretofore made of brushwood, through which the fish might escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape is debarred, except in times of extraordinary flood.

^r Salk. 637.

^s Weld v. Hornby, 7 East, 195.

CHAP. XXII.

FRAUDS, STATUTE OF.

Stat. 29 Car. 2. c. 8. entitled, An Act for Prevention of Frauds and Perjuries.

- I. *Introduction. The first, second, and third Sections, relating to parol Demises, Assignments, and Surrenders.*
- II. *The fourth and seventeenth Sections, relating to Agreements.*
- III. *The fifth and sixth Sections, relating to the Execution and Revocation of Wills.*

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- I. *Introduction. The first, second, and third Sections, relating to parol Demises, Assignments, and Surrenders.*

INTRODUCTION.—This statute, the wise provisions of which have been so often and so justly commended (1), is supposed to have been the joint production of Sir Matthew Hale, Sir F. North, and Sir Leoline Jenkins, an eminent civilian^a. Sir M. Hale, however, died a few months before

^a See Gilb. Eq. R. 171. and Ld. Keeper Guildford's Life, p. 109.

(1) Ld. Nottingham used to say of this statute, that every line of it was worth a subsidy. Ld. Keeper Guildford's Life by R. North, p. 109. See also Chaplin v. Rogers, 1 East, 194, where Lord Kenyon C. J. said, "It is of great consequence to preserve unimpaired the several provisions of the statute of frauds, which is one of the wisest laws in our statute book."

the act passed into a law (2); and this circumstance may possibly account for the inaccuracies, which have been discovered in the composition^b. To detail all the clauses of this statute, and to notice the construction which they have received in a variety of decisions, would far exceed the limits prescribed to this abridgment: it would, indeed, be in a great measure superfluous, since this arduous task has been already, in part, performed by a learned gentleman, who has signified an intention to complete his valuable treatise (3). The object of the present chapter will be merely to select such of the provisions of the statute of frauds as fall within the scope of this work, and to subjoin, in a regular series, the cases which have arisen, and the decisions thereon.

1st Section.—By this statute, for prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury, and subornation of perjury, it is enacted, that; “All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only.”

2d Section.—“Except all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts, at the least, of the full improved value of the thing demised.”

Collecting the meaning of the first section^c, by aid derived

^b See Doug. 244. n.

^c Per Ellenborough C. J. in *Crosby v. Wadsworth*, 6 East, 602.

(2) Sir M. Hale died on the 25th of December, 1676. The parliament met on the 15th February following, and this statute received the royal assent on the 16th April, 1677. From the circumstance of this statute not having passed until after the death of Sir M. Hale, Lord Mansfield inferred, that it could not have been drawn by him; more especially as the bill was introduced in the usual manner, and not upon any reference to the judges. See *Wyndham v. Chetwynd*, 1 Burr. 418.

(3) See a Treatise on the Statute of Frauds, by W. Roberts, of Lincoln's Inn, 8vo. 1805.

from the language and terms of the second, and the exception therein contained, I think, that the *leases, &c.*, meant to be vacated by the first section, must be understood as *leases* of the *like* kind with those in the second section, but which conveyed a *larger interest* to the party *than for a term of three years*, and such also as were made *under a rent reserved thereupon*. Hence, where the plaintiff^d agreed *by parol*, with the defendant, for the purchase of a standing crop of mowing grass, then growing in a close of the defendant's, for a certain sum; it was holden, that the agreement was not a lease, estate, interest of freehold, or term of years, "or an uncertain interest of, in, to, or out of lands created by parol," within the meaning of the first section, so as to be void on the ground of *not having been in writing*.

In an action for the breach of an agreement, whereby the defendant agreed to take of the plaintiff certain premises for 15 years^e, it appeared, by the evidence of an attorney, that he had prepared a draft of a lease, which he had sent to an attorney on the part of the defendant for perusal, who made some alterations in it, and returned it; that soon after, the defendant, being unable to perform the agreement, applied to the plaintiff to cancel it; to which the plaintiff did not object, upon being indemnified against the expense which he had incurred; but before he would try to let it again, he required the defendant to relinquish the agreement by writing, whereupon the defendant wrote on the draft of the lease as follows: "I hereby request Mr. Shippey, to endeavour to let the premises to some other person, *as it will be inconvenient to me to perform my agreement for them*, and for so doing, this shall be a sufficient authority. I. Derrison." The defendant having refused to make any compensation, this action was brought. It was admitted, that at the time when the agreement for the lease was entered into, it was not reduced into writing, nor was any memorandum made or note of it. It was objected, that the agreement was void by the statute of frauds; and *Hawkins v. Holmes*, 1 P. Wms. 770. was cited. But, per Lord Ellenborough C. J. "It is not necessary that the note in writing should be contemporaneous with the agreement. It is sufficient if it has been made at any time, and adopted by the party afterwards; and then any thing under the hand of the party, expressing that he had entered into the agreement, will satisfy the statute, which was only intended to protect persons from

^d S. C.

^e *Shippey v. Derrison*, 5 Esp. N. P. C. 190.

having parol agreements imposed on them. In this case, the endorsement says, that he was unable to perform the agreements for the premises, and it is written on the draft of the lease of those premises, which had been perused and altered by his own attorney. It is sufficient with respect to the case from Peere Williams, to observe, that was an agreement purely executory, and nothing more than the bare draft of the lease, which was not signed by the party."

Any uncertain interest in land.] The defendant had agreed^f, by parol, that the plaintiff should have the liberty of stacking coals upon part of a close belonging to the defendant, for the term of seven years; and that, during this term, the plaintiff should have the sole use of that part of the close (4). After the plaintiff had, pursuant to this agreement, enjoyed the liberty of stacking coals for three years, the defendant locked up the gate of the close. The question was, whether this agreement was good for seven years? Lee C. J. and Denison J. were of opinion, that it was; observing, that in the case of Webb v. Paternoster, Palm. 71. it was laid down, that the grant of a licence to stack hay upon land did not amount to a lease of the land; and, although it was said in that case, that such a licence, provided the grant were for a time certain, was irrevocable, yet it did not follow, that an interest in the land did thereby pass. As the agreement, in the present case, was only for an easement, and not for an interest in the land, it did not amount to a lease; and, consequently, it was, notwithstanding the statute, good for seven years. Foster J. concurred in opinion, that the agreement did not amount to a lease; but he inclined to be of opinion, that the words in the statute, "any uncertain interest in land," extended to this agreement, and, consequently, that it was not good for more than three years. Lee C. J. and Denison J. were of opinion, that these words related only to interests, which are uncertain *as to the time of their duration*. After consideration, it was holden, that the agreement, though by parol, was good for seven years.

^f Wood v. Lake, Say. Rep. 3.

(4) From a MS. note of this case it appears, that the consideration to be paid by the plaintiff for the liberty of stacking the coals, was 20s. for every stack.

Shall have the force and effect of leases at will ONLY.] Notwithstanding these words, a lease by parol, for a longer term than three years, will enure as a tenancy from year to year.

In an action against a tenant^s, for double rent, for holding over after the expiration of his term, and a regular notice to quit, the first count in the declaration stated a holding under a certain term, determinable on the 12th of May then last past; and other counts stated a holding from year to year, determinable on the same day. It appeared in evidence, that the defendant had held the premises for two or three years, under a parol demise for twenty-one years from the day mentioned, to which the notice to quit referred. It was contended at the trial, that the holding should have been stated according to the legal operation of it, as a tenancy at will; and, as there was not any count adapted to that statement, the plaintiff ought to be nonsuited. Rooke J. however, considering that it amounted to a tenancy from year to year, overruled the objection, and the plaintiff obtained a verdict. On motion to set aside the verdict, on the ground of a misdirection, Lord Kenyon C. J. said, that the direction was right, for such holding now operates as a tenancy from year to year. The meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been properly construed to enure as a tenancy from year to year.

If a landlord lease for seven years by parol^h, and agree that the tenant shall enter at Lady Day and quit at Candlemas, though the lease be void by the statute of frauds, as to the duration of the term, the tenant holds under the terms of the lease in other respects, and, therefore, the landlord can only put an end to the tenancy at Candlemas.

3rd Section.—"And, moreover, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

The mere cancelling in fact of a lease^l cannot be consi-

^g Clayton v. Blakey, 8 T. R. 3.

^h Doe d. Rigge v. Bell, 5 T. R. 471.

ⁱ Roe d. E. Berkeley v. Abp. of York, 6 East, 86.

dered as either a deed or note in writing within the meaning of this clause, and, consequently, will not be a surrender. A parol assignment of a lease from year to year is void under this clause^k.

II. *Fourth and Seventeenth Sections relating to Agreements.*

4th Section.—"No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage, of another person; or to charge any person, upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

It will be proper to remark, that this section was intended for the relief of personal representatives and others, and it was not thereby intended that they should be charged further or otherwise than by common law they were chargeable. Before the statute, a promise, made with reference to any of the subjects mentioned in this section, would not have made the party promising liable, unless such promise had been founded on a sufficient consideration. The same rule holds since the statute, with this addition, that such promise, and the consideration^l on which it is founded, must be in writing, and signed by the party to be charged, or his agent. If an action is brought for the non-performance of the promise, it is not necessary that it should be stated in the declaration^m, that the agreement was in writing; it will be sufficient for the plaintiff to produce a written agreement

^k Botting v. Martin, Sussex Lent Ass. 1868, coram Sir A. McDonald, C. B. ^l Wain v. Warlters, 5 East, 10. ^m Anon. Salk. 519. 2 Burr. 1090. per Yates J., S. P.

in evidence at the trial (5); but if such agreement be pleaded in bar of another action, it must be shewn on the face of the plea, that it was in writing; for, otherwise, it would not appear that it was an agreement whereon an action might be maintained^a.

Having premised that the preceding remarks apply to each of the clauses in this section, and that they are introduced in this place for the sake of avoiding repetition, I shall proceed to consider the several clauses separately.

No action shall be brought to charge any executor or administrator upon any special promise, to answer damages out of his own estate.] The leading case on this clause is that of *Rann v. Hughes*: in that case it was stated in the declaration^b, "that disputes had arisen between the testatrix and the intestate, which had been referred to arbitration; that the arbitrators awarded, that the intestate should pay to the testatrix a certain sum of money on a day appointed; that afterwards the intestate died, possessed of effects sufficient to pay the sum awarded; that at the time of the death of the testatrix, the sum awarded remained unpaid, by reason of which, the defendant, as administratrix, became liable to pay the plaintiffs as executors the said sum, and being so liable, the defendant (not saying as administratrix) in consideration thereof, promised to pay the same. Pleas. 1. Non assumpsit. 2. Plene administravit. 3. An outstanding debt on bond, and plene administravit præter. The replication took issue on all the pleas. Verdict for the plaintiffs on the first issue, and damages assessed: on the other issues, for the defendant. The plaintiffs entered judgment for the damages assessed and costs, against the defendant *generally*. On a writ of error in the Exchequer Chamber, it was assigned for error, that the defendant was impleaded as administratrix of the intestate, yet judgment was given against her *generally*, and without any regard to her having goods of the intestate in her hands to be administered. The Court of Exchequer Chamber reversed the judgment,

^a Case v. Barber, T. Raym. 450.

^b *Rann and another, executors of Mary Hughes v. Isabella Hughes, administratrix of John Hughes.*

(5) A plea of tender to the action will supersede the necessity of this proof; for by payment of money into court upon that plea, the defendant admits the cause of action. *Middleton v. Brewer*, Peake's N. P. C. 15.

Upon a writ of error from this judgment, in the House of Lords, the following question was put to the judges: Whether sufficient matter appeared upon the declaration to warrant, after verdict, the judgment entered up against the defendant in error in her personal capacity? Skynner C. B. delivered the unanimous opinion of the judges, 1. That there was not a sufficient consideration to support this demand, as a personal demand against the defendant; inasmuch as the defendant did not derive any advantage from the promise, for it was a promise generally to pay upon request, what she was liable to pay upon request in another right, and the promise was not founded on any consideration of forbearance or the like, which might have supported it. 2. That the promise not being founded on any consideration, the circumstance of its being in writing (which might be presumed after verdict) would not assist the case; for, by the law of England, an agreement merely written, and not being a specialty, required a consideration. 3. That the statute of frauds had not taken away the necessity of a consideration; for that statute was made for the relief of personal representatives, and did not intend to charge them further, than by common law they were chargeable.

Or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person.] In order to bring a case within this clause of the statute, it is essentially necessary that the person, on whose behalf the promise is made, should be liable, as well as the promiser, or, as it is sometimes expressed, (though the propriety of the expression has been questioned) (6) that the promise should be collateral, and not original. This distinction will be illustrated by the following cases, which are arranged under two divisions; first, cases within the statute; secondly, cases not within the statute.

I. *Cases within the 2d Clause of the 4th Section.*—In an action upon the case, the plaintiff declared, that the defendant, in consideration that the plaintiff would let his gelding out to hire to J. S., promised the plaintiff that J. S. should redeliver the gelding, but that J. S. never did redeliver him. It was objected, that the plaintiff had not any remedy against the party upon the contract, for not re-

p D. P. 14 May, 1778. 4 Bro. P. C. q Buckmyr v. Darvall, Ld. Raym. p. 27. Tomlin's ed. 7 T. R. 350. n. 1085. Salk. 27. B. R. 6 Mod. 248. S. C.

(6) "Many of the doubts upon this statute have arisen from making use of the word collateral, which is not a word used in the statute." Bull. N. P. 281.

delivering the gelding, except by an action of trover upon the subsequent tort, in case of demand and refusal; and, therefore, as such remedy accrued from a wrong, subsequent to the contract, the present case was not within the meaning of the statute; but the court overruled the objection, observing, that the party was also liable in detinue upon the original delivery or bailment, the bailment having been such as in its nature required a redelivery; and if the bailee will not redeliver the thing bailed, the only adequate remedy is an action of detinue against the bailee; consequently, this promise of the defendant's, that J. S. should redeliver the horse bailed, for which there was a remedy against J. S. upon the bailment, was a collateral promise, and, therefore, a promise to answer for the act and default of another, within the statute.

The defendant, in consideration that the plaintiff would not sue J. S., promised to pay the plaintiff the money due from J. S.; this was holden to be within the statute, for there was not any consideration stated for which the plaintiff had promised not to sue, and if there had, J. S. could not have availed himself of this agreement between the defendant and plaintiff, but the debt would still have subsisted, and, consequently, the promise was collateral.

J. S. was indebted to the plaintiff in a sum of money^a, for the recovery of which the plaintiff had commenced an action; whereupon the defendant, in consideration that the plaintiff would stay his action against J. S., promised to pay the plaintiff the money owing to him by J. S. This was holden to be clearly within the statute; on the ground that there was a debt of another still subsisting, and a promise to pay it.

An opinion formerly prevailed, that, in order to bring a case within the statute, it was necessary that there should be an existing debt owing from the person on whose behalf the undertaking was made, *at the time* of such undertaking. Hence, a promise on the behalf of another, for the payment of the price of goods, *before* the delivery of such goods, was holden not within the statute; because at the time of the promise there was not any debt^b (7). But this distinction was overruled in the following cases.

^a *Rothery v. Curry*, Bull. N. P. 281.
^b *Fish v. Hutchinson*, 2 Wils. 94.

^t *Mawbrey v. Cunningham*, *sittings*
 after H. T. 1773, cited in *Jones v.*
Cooper, Cowp. 228.

(7) In *Legge v. Gibson*, B. R. T. 29 G. 3. MS. Buller J. said,
 "that he had always been of opinion that Ld. Mansfield's doctrine

In an action for goods sold and delivered^a, it appeared in evidence, that the goods in question had been delivered to J. S. in consequence of a *parol* promise by the defendant to the plaintiff in these words, "*I will pay you, if J. S. will not.*" J. S. was entered as the debtor in the plaintiff's books. The court were of opinion, that this promise by the defendant was a collateral undertaking within the statute.

The defendant had asked M.^x (one of the plaintiffs) whether he was willing to serve J. S. with goods? M. answered, that he did not know J. S.; to which the defendant replied, *if you do not know him, you know me, and I will see you paid.* M. then said, he would serve him; to which the defendant answered, "he is a good chap; *but I will see you paid.*" A letter was afterwards received by the plaintiffs from J. S. containing an order for certain goods, which were afterwards sent to him. The plaintiffs made J. S. the debtor for these goods in their books; J. S. having refused to pay for the goods, an action for goods sold and delivered was brought against the defendant. The court held, that the case was within the statute, there not having been any promise in writing, and gave judgment for the defendant; Buller J. observing, that the general rule now was, that *if the person for whose use the goods are furnished be liable, any other promise by a third person to pay that debt must be in writing.*

The plaintiff, a woollen-draper in London^y, employed a rider to receive orders from his customers in the country. The defendant, meeting with the rider at Deal, desired him to write to the plaintiff, to request him to supply the defendant's son (who traded to the West Indies) with whatever goods he might want, *on his, the defendant's, credit*; and at the same time said, "use my son well, charge him "as low as possible, and *I will be bound for the payment of the money, as far as 800l. or 1000l.*" The rider accordingly wrote to the plaintiff the following letter: "Mr.

^a Jones v. Cooper, Cowp. 237.

^y Anderson v. Hayman, 1 H. Bl. 120.

^x Matson and another v. Wharam,

2 T. R. 60.

in Cunningham v. Mowbray was right and warranted by the statute; because in these cases, when a third person is called in, the real meaning is, that the party will not trust the person first applying, and gives credit to the last; that Lord Mansfield's distinction between a promise made at the time and afterwards was sound. This case had been overruled, but he had seen no reason to alter his opinion."

" Hayman of this town says, his son will call on you, and leave orders; and he has promised me to see you paid, if it amounts to 1000*l*. N. B. If deal for twelve months' credit, and pay in six or eight months, expects discount in proportion." Soon after the son received goods from the plaintiff to the amount of 800*l*., which were delivered to him in consequence of the before-mentioned engagement of the father. *The son was debited in the plaintiff's books*, and having been applied to for payment, wrote the following answer to the plaintiff: " In answer to your letter I can only say, that I understand your credit for the goods was twelve months, which was also mentioned by your rider to my father: I shall, at this rate, make you remittances for the different parcels as they become due." The son afterwards became a bankrupt, and this action was brought against the father, to recover the value of the goods. Heath J. (who tried the cause) directed the jury to consider, whether the plaintiff gave credit to the defendant *alone*, or to him *together with his son*; that in the former case, they should find a verdict for the plaintiff; in the latter, for the defendant; being of opinion, that if any credit was given to the son, the promise of the defendant, not being in writing, was void by the statute. A verdict was found for the defendant, and a rule was obtained to set it aside; which the court afterwards discharged, being clearly of opinion, that this promise, not being in writing, was void by the statute, as it appeared from the letter of Hayman, the son, that credit was given to him as well as to the defendant.

Where a parol agreement is entered into for the payment of the debt*, or part of the debt of another person, and also, for the performance of some other act, the promise to perform which would not of itself be required to be in writing, an action cannot be maintained on such agreement; because the agreement being entire, it is incapable of separation, so as to enable the plaintiff to recover on one part alone.

J. S. being indebted to several persons*, and among others to the plaintiff (who had incurred considerable expenses in law proceedings against J. S. for the recovery of his debt), and a proposal having been made, at a meeting of the creditors, that they should receive a composition of 10*s*. in the pound; all the creditors consented to take it except the plaintiff, who refused to consent, unless the law expenses

z *Lexington v. Clarke*, 2 W. & M. C. a *Chater v. Beckett*, 7 T. R. 201.
B. 2 Vent. 223.

before mentioned were also paid; whereupon the defendant promised to pay those expenses, and to accept bills drawn by the plaintiff on him to the amount of the composition. The plaintiff accordingly drew bills on the defendant to that amount, which he accepted and paid; but the defendant having refused to pay the law expenses, the plaintiff paid them to his own attorney, and then brought an action against the defendant, declaring on the special agreement, and also for money paid: it was holden, 1st, That the agreement, *being by parol*, the plaintiff could not recover on the special count; for, though the agreement was to do something beyond payment of part of the debt of another, yet, being entire, the plaintiff could not separate it, and recover on one part only. 2dly, That the plaintiff could not recover on the count for money paid; because, in order to support that count, there should have been evidence of the plaintiff having paid a sum of money which defendant was bound to pay; whereas here the plaintiff, not the defendant, was bound to pay the law expenses.

2. *Cases not within the 2d clause of the 4th section.*—An action having been brought against the defendant, an attorney, and two others, for appearing for the plaintiff without a warrant, the record was carried down to be tried at the assizes^b, when the defendant promised, in consideration that the plaintiff would not further prosecute the action, defendant would pay 10*l.* and costs of suit. In an action on this promise, the question was, whether this was a promise within the statute; and it was holden, that it was not; as not being a promise to pay the debt of another, but to pay the party's own debt.

A., the plaintiff's testator^c, brought an action of assault and battery against J. S.; the cause being at issue, the record entered, and just coming on to be tried, the defendant, in consideration that A. would withdraw the record, promised to pay him a sum of money, and the costs to that time; whereupon A. withdrew his record; A. died: the plaintiff, his executor, brought this action upon the special promise of defendant. The defendant pleaded the statute of frauds, viz. that there was not any agreement in writing, touching the promise. On demurrer, the court gave judgment for the plaintiff; being of opinion, that this promise was not within the statute; that it was an original promise sufficient to found an assumpsit against the defendant; that it was a lien upon the defendant, and upon him only; that J. S. was not

^b *Stephens v. Squire*, 5 Mod 205.

^c *Read v. Nash*, 1 Will. 305.

a debtor; the cause was not tried; it did not appear that J. S. had been guilty of any default or miscarriage; there might have been a verdict for him, if the cause had been tried; J. S. never was liable to the particular debt, damages, or costs; that the true difference was between an original promise, and a collateral promise; the former promise was not within the statute, the latter was.

In an action of *indebitatus assumpsit*, for money laid out to the use of defendant⁴, by the plaintiff, at the request of the defendant; the evidence was, that one D. coming to the plaintiff, by the defendant's order, for money to pay some workmen, who had been employed in the garden of J. S., the infant grandson of defendant, the plaintiff refused to pay the money, unless the defendant would sign a receipt. Whereupon the defendant wrote the following note, viz. "This is to certify, that it is my request that you pay to Mr. D. on the account of J. S., for the workmen's use, the sum of £ ;" signed by the defendant. It was objected, that this was evidence only of a collateral security, and not of a debt from the defendant. But *per cur.* the money was manifestly advanced on the defendant's credit, and its being on account of the defendant's grandson, an infant, is a matter merely between the defendant and the infant. The defendant is the debtor to the plaintiff: the objection arises from an ambiguous use of the term *collateral* promise; by which the defendant must mean a special undertaking upon a special contingency; as, if such a one does not pay, I will. It is also applied to a joint undertaking, which is joint and several, and is called collateral as between the two debtors, but is original in each of them as to the creditor; so in this case, there is an original undertaking by the defendant, though, perhaps, she may undertake this as security for her grandson, as between him and her. The defendant is the only original debtor; for the infant never could be liable.

A., being indebted to the plaintiff for the rent of a dwelling house⁵, in arrear for three quarters of a year, and becoming insolvent, made a bill of sale of all his goods in the house, to the defendant Leaper, in trust, to be sold by him as broker, for the benefit of A.'s creditors; defendant accordingly advertised a sale: on the morning of the sale, and while the defendant was in possession of the goods upon the premises, the plaintiff (the landlord) came there to distrain for his rent; whereupon the defendant, in consideration

d Harris v. Huntbach, 1 Burr. 373.
and MSS.

e Williams v. Leaper, 2 Will. 306.

3 Burr. 1886. S. C. recognised by Ellenborough C. J. and Grose J. in Castling v. Aubert, 2 East, 225.

that the plaintiff would not distrain, promised to pay the plaintiff the rent in arrear. Upon this promise of the defendant an action was brought, and the question was, whether the promise was within the statute. It was holden, that it was not (8).

The case of *Keat v. Temple*, 1 Bos. & Pul. 158. where a question arose on the clause of the statute now under consideration, is omitted on account of its special circumstances.

The plaintiff, who was the broker of J. S.^f, having policies

^f *Castling v. Aubert*, 2 East, 325.

(8) It is extremely difficult to collect from the reports the precise ground on which this case was decided. Lord Mansfield C. J. and Wilmut J. seem to have founded their opinions on a supposition, that the plaintiff had actually distrained and was in possession of the goods at the time when the promise was made; but the fact was, that the plaintiff was not in possession, (see 2 Wils. 308.) he had merely given notice to distrain. (See the remark of Lawrence J. 2 East, 330.) Yates J. argued upon the ground of the defendant being in possession, and seems to have thought that the defendant derived an advantage from the plaintiff's permitting him to proceed in the sale of the goods; and that this was an original consideration to the defendant. Aston J. considered the goods as the only debtor; and consequently that the promise was not a promise to pay the debt of the tenant. Such is the report of this decision; but, whatever may have been the grounds on which it proceeded, the case has since been recognized. In assumpsit for the repair of a carriage, it appeared that the carriage had been bought by J. S. but had been sent to be repaired by the defendant. When the repairs were done, the defendant directed the plaintiff to pack up the carriage, and send it on board ship. Upon the plaintiff's inquiring who was to pay for the repairs, the defendant said, as he had sent the carriage, he would pay for the repairs. Accordingly the carriage was packed up and sent on board ship, and a bill made out and delivered to the defendant. It was contended, on the part of the defendant, that the undertaking ought to have been in writing; but, per Lord Eldon C. J. in general cases to make a person liable for goods delivered to another, there must be either an original undertaking by him, so that the credit was given solely to him; or there must be a note in writing. There may, however, be cases where this rule does not apply: *If a person obtains possession of goods, on which the landlord has a right to distrain for rent, and he promises to pay the rent, though it is clearly the debt of another, yet a note in writing is not necessary.* That applies precisely to the present case. The plaintiff had, to a certain extent, a lien on the carriage, and he parted with it on the defendant's promise to pay. This takes the case out of the statute. *Houlditch v. Milne*, 3 Esp. N. P. C. 86.

of assurance of great value in his hands, belonging to J. S., accepted several bills for the accommodation of J. S. A loss having happened on the policies, which the underwriters had agreed to pay, but which J. S. could not receive without having the policies to produce, the plaintiff was applied to, to give them up for that purpose to the defendant, into whose hands J. S. had at that time transferred the management of his insurance concerns. Some of the plaintiff's acceptances being then outstanding, (and particularly an acceptance on a bill in the hands of J. N.) upon which writs had been sued out (though not then executed) against J. S. as drawer, and the plaintiff as acceptor, the plaintiff refused to deliver up the policies, they being the only securities he had against his acceptances, without an indemnity; whereupon it was *verbally* agreed between plaintiff, defendant, and J. S., that the defendant, upon the policies being made over to him, should pay the amount of the bill in the hands of J. N., with the costs incurred, and should lodge money in a banker's hands for the satisfaction of the remainder of the acceptances as they became due. In pursuance of this agreement, the defendant paid into the banker's hands the sum agreed on, and the plaintiff delivered up the policies to the defendant. The defendant received from the underwriters the amount of their subscriptions, far exceeding the sum in dispute; but refused to pay the debt and costs on the bill in J. N.'s hands; in consequence of which refusal, the plaintiff was arrested at the suit of J. N. Upon this the plaintiff brought an action against the defendant, declaring upon the special agreement, and also for money had and received. The question was, whether the promise of the defendant to pay the sum due from J. S. for the debt and costs, on having the policies of assurance delivered to him, was within the statute? The court were of opinion, that it was not; Lawrence J. observing, that this was to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It was not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay, if the plaintiff would furnish him with the means of doing it. And per Le Blanc J. "This is a case where one man, having a fund in his hands, which was adequate to the discharge of certain incumbrances, another party undertook, that if the fund were delivered up to him, he would take it with the incumbrances: this, therefore, has not any relation to the statute of frauds."

To an action of assumpsit for not replacing some bank an-

nuities^g, the produce of which had been paid by the plaintiff to the defendant, on his undertaking to replace the same within a certain time; the defence was, that the defendant being indebted to the plaintiff, as stated in the declaration, and also to several other persons, an investigation was had of his affairs, and it was found that his estate was inadequate to the payment of his debts, whereupon it was agreed between the plaintiff, and the other creditors, and one J. S., that J. S. should, out of his own money, pay the plaintiff and the other creditors 10s. in the pound on the amount of their debts, to be received by them in full satisfaction, and that they should assign their debts to J. S.; that J. S., in pursuance of this agreement, tendered out of his own money, a sum amounting to 10s. in the pound on the debt of the plaintiff, which he refused to accept. It was objected, that the undertaking of J. S. not being in writing, this defence could not be sustained. But the court overruled the objection, Chambre J. observing, that this was a contract to purchase the debts of the several creditors, and not a contract to pay the debt of the defendant. It was of the substance of the agreement, that the debts should remain in full force to be assigned to J. S., and J. S. had a right to make use of the names of the original creditors to recover the same to the full amount, if defendant had effects to satisfy the debts. He concluded with this remark: "We all agree upon the point, that it is a contract for the purchase of the debts of the defendant, which is not prohibited by the statute of frauds."

Or to charge any person upon any agreement made in consideration of marriage.] It is now settled, notwithstanding former decisions to the contrary^h, that this clause does not extend to mutual promises to marry; consequently, such promises are binding, although they are not reduced into writing and signed by the party.

The plaintiff declaredⁱ, that in consideration of her having promised to marry the defendant, he promised to marry her at his father's death; and averred, that the father was dead, but the defendant had refused to marry plaintiff, and had since married A. B. On non-assumpsit pleaded, and verdict for plaintiff, it was moved, in arrest of judgment, that this parol promise was not good in law. But (after argument) it was holden, that the case was not within the

^g *Anstey v. Marden*, 1 Bos. & Pull. N. R. 124.

^h *Philpot v. Wallet*, 3 Lev. 65; *Freem.* 241. S. C.

ⁱ *Cork v. Baker*, 1 Str. 24. *Harrison v. Cagg*, *Ld. Raym.* 396. S. P. per

^l *Ward C. B. Carth.* 467, 8.

statute; for that this clause in the statute related only to contracts in consideration of marriage; and the defendant, having married another person, had disabled himself from performing the promise; the plaintiff, therefore, could not apply to the spiritual court to have a performance decreed, and consequently was entitled to a compensation in damages.

Or upon any contract or sale of lands, &c. or any interest in or concerning them.] An agreement conferring an exclusive right to the vesture of land¹, during a limited time, and for given purposes, is a contract or sale of an interest in, or at least an interest concerning lands; and for the non-performance of such contract, if made by parol, an action cannot be maintained. It must be observed, however, that the statute does not expressly and immediately vacate such contract, if made by parol; it only precludes the bringing an action to enforce it, by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof. Hence, if the contract be executed, the parties cannot treat it as a nullity.

Indebitatus assumpsit for a crop of potatoes bargained and sold², and dug up and carried away by virtue of such bargain and sale. On the 21st day of November, 1807, the defendant purchased of the plaintiff, by parol, at so much per sack, a crop of potatoes then in the ground. The defendant was to dig them up and remove them without delay, as the plaintiff wanted the ground for other purposes. The defendant accordingly dug up and carried away more than half the crop, but was prevented by the frost from taking the remainder. The plaintiff brought his action to recover the value of the whole crop. The defendant paid into court a sum of money equivalent to the value of that portion of the crop which he had taken. It was objected, that this was a contract or sale of an interest in land. But per Lord Ellenborough C. J. The liberty which the defendant had of entering the close for the purpose of taking the crop, amounted to an easement, and nothing more. No interest in the land itself passed, or was intended to pass by the contract. The defendant could not have maintained ejectment to recover possession of the crop. In this respect this case differed materially from that of *Crosby v. Wadsworth*, which he was not disposed to extend; in that case the subject matter of the contract was the *prima vestura*, for which

¹ Per Ellenborough C. J. delivering the opinion of the court in *Crosby v. Wadsworth*, 6 East, 602. ² *Parker v. Staniland*, B. R. Trin. T. 1809, 11 East, 362.

ejectment lies, as does also trespass quare clausum fregit. But trespass quare clausum fregit could not be brought by this defendant for a trespass to the close in which the crop of potatoes grew. It did not follow, that, because the crop of potatoes was not at the time of the contract a chattel, it was therefore an interest in land. Bayley J. said, it was a thing whose growth was at an end, and in this respect distinguishable from the case of *Bristow v. Waddington*^a, which was a contract for the next year's crop of hops; and that he considered the land merely as a warehouse, and that the contract was substantially the same thing, as if the potatoes had been deposited in a warehouse at the time of the sale.

But in a case^b where there had been a sale of a crop of growing turnips, it was holden, that this was a sale of an interest in land. N. No time was stipulated for the removal of the turnips.

An action of *indebitatus assumpsit*^c, with a count on *quantum meruit*, for moieties of crops of wheat sold by the plaintiff to the defendant, and accordingly reaped for his, the defendant's, own use; and also a count for money had and received. The case was, that the plaintiff, by a parol agreement, had let land to the defendant, from which he was to take two successive crops, and to render the plaintiff a moiety of the crops in lieu of rent. While the crops of the second year were on the ground, an appraisement of them was taken by both parties, and the value ascertained. The defendant having afterwards refused to pay a moiety of the value, this action was brought. It was objected, on a case reserved, that the agreement was within the statute; because it related to land; but the court overruled the objection; Eyre C. J. observing, that the circumstance of the appraisement seemed to put an end to this point. It was true, that as the case originally stood, the plaintiff had a claim to a moiety of the produce of the land under a special agreement, but that special agreement was executed by the appraisement. The circumstance of the appraisement afforded clear proof, that the plaintiff sold what the defendant had agreed was his; and the price having been ascertained, brought this to the case of an action for goods sold and delivered (9).

^a 2 Bos. & Pul. 452.

recognising *Bristow v. Waddington*,

^b *Emmerson v. Heelis*, 3 Taunt. 36.

2 Bos. & Pul. 452

^c *Poulter v. Killingbeck*, 1 Bos. & Pul. 397.

(9) "The contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific

But although the contract is not itself wholly void^a under the statute, merely on account of its being by parol, so that if the same is executed, the parties cannot treat it as a nullity, yet, while it remains executory, it may be discharged by parol, before any thing is done under it which can amount to a part execution of it.

This clause comprehends sales of land by auction as well as other sales^r; hence, where land had been sold by auction, and the contract having been abandoned, an action was brought to recover the deposit, in which action the plaintiff declared specially on the contract; it was holden, that it was incumbent on the plaintiff to prove a contract in writing^s, in the manner specified in the statute; and that the entry by the auctioneer of the buyer's name could not be considered as a sufficient memorandum and signature of the agreement, so as to satisfy the requisitions of the statute; although a different doctrine had been laid down with regard to the 17th section, relating to the sale of goods, upon the construction of which it has been holden^t, that the auctioneer must be considered as the agent of both parties, and a memorandum made by him sufficient to bind the bargain.

But in a late case of *Emmerson v. Heelis*^u, it was solemnly decided, that a signing by the auctioneer is a signing by an agent for the purchaser, although the contract be a contract for the sale of an interest in land.

Or upon any agreement that is not to be performed within the space of one year from the making thereof.] This clause extends to those cases only, where, by the express agreement of the party, the act is not to be performed within a year. Hence, it has been holden^x, that a promise to pay

q *Crosby v. Wadsworth*, 6 East, 602.

r *Walker v. Constable*, 2 Esp. N. P. C. 659. 1 Bos. & Pul. 306. per Erskine C. in *Buckmaster v. Harrop*, L. I. H. Dec. 18, 1806.

s *Stansfield v. Johnson*, coram Eyre C. J. 1 Esp. N. P. C. 101. But see the remarks of Eldon C. in *Coles v. Trecothick*, 9 Ves. jun. 249. adopted

by Erskine C. in *Buckmaster v. Harrop*, L. I. H. Dec. 18, 1806.

t *Simon v. Metivier*, 1 Bl. R. 60. 3 Burr. 1991. recognized as to this point in *Hinde v. Whitehouse*, 7 East, 558.

u 2 Taunt. 38.

x By the judges, ex. rel. *Treby C. J. Anon. Salk. 280.* recognized by *Wilmot J.* in 3 Burr. 1381.

produce, no longer did so: it was originally an agreement to render what should have become a chattel, *i. e.* part of a severed crop in that shape, in lieu of rent, and by a subsequent agreement it was changed to money instead of remaining a specific render of produce." Per *Ellenborough C. J.* 6 East, 612.

money on the return of a ship, which happened not to return within two years after the promise made, was not within the statute; for, by possibility, the ship might have returned within a year.

So where an action was brought upon an agreement^y, in which the defendant promised, for one guinea, to give the plaintiff so many on the day of his marriage. The marriage did not take effect until nine years after the agreement; and the question was, whether the agreement ought to have been in writing. Holt C. J. (before whom the cause was tried) advised with all the judges, and it was said by the majority of them, (for there was a diversity of opinion, and Holt differed from the majority) (10), "Where the agreement is to be performed upon a contingency, and it does not appear on the face of the agreement that it is to be performed after the year, there a note in writing is not necessary; for the contingency might happen within the year; but where it appears from the whole tenor of the agreement, that it is to be performed after the year, there a note in writing is necessary."

So where the plaintiff declared^z, that the defendant's testator, in consideration that the plaintiff would become his housekeeper, and take upon herself the care and management of his family, as long as it should please both parties, undertook to pay her wages, at the rate of £ for one year; and also by his will to bequeath to her an annuity of £ for life, payable yearly from the day of his death; and then averred, that she became his housekeeper, and so continued for three years and upwards, but that the defendant's testator had not bequeathed her the annuity; the agreement

^y Peter v. Compton, Skin. 353. cited ^z Fenton v. Emblers, Exor. 3 Burr. by Denison J. in Fenton v. Emblers, 1278. 1 Bl. R. 353. S. C. 3 Burr. 1281.

(10) If the marriage had taken effect within the year, all the judges agreed no writing was necessary; but, as in the case before them, the marriage did not happen within the year, but nine years after the promise, Holt C. J., and the minority of the judges, were of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year. See Smith v. Westall, Lord Raym. 316, 7. Holt C. J. had expressed the same opinion with respect to the necessity of the contingency happening within the year, in order to take a case out of the statute, in Francam v. Foster, Skin. 326.

having been by parol, it was contended, that the case was within the statute, for it could not be performed on the part of the testator within a year; for a whole year from his death was to elapse, before the annuity, or any part of it, would become payable. To this it was answered, that the action was brought for the testator not having done what he ought to have done in his lifetime, viz. bequeathing the annuity by will, which might have been done within the year. The court held the case not within the statute, and Denison J. said—"The statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon a contingency. It does not extend to cases, where the thing *may* be performed within the year."

An objection upon this clause was taken in the case of *Poulter v. Kittingbeck*, 1 Bos. & Pul. 397. (for a particular statement of which see ante p. 765.) but the court were of opinion, that the subsequent agreement relieved the case from the objection.

By the word *performed* in this clause, the legislature meant a complete and not a partial performance. Hence, if it appear to have been the understanding of the parties to a contract, at the time, that it was not to be completed within a year^a, although it might, and was in fact in part performed within that time, such contract is within this clause, and if the requisites of the statute are not complied with, it cannot be enforced.

Unless the agreement or some memorandum or note thereof shall be in writing.] The word *agreement* is not to be understood in the loose incorrect sense, in which it is sometimes used as synonymous to *promise* or *undertaking*, but in its proper and correct sense, as signifying a mutual contract on consideration between two or more parties. Hence, the whole agreement, that is, not the promise only, but the consideration upon which it is founded, must be in writing^b.

An action was brought to recover the value of goods, which had been furnished by the plaintiff to one Nichols^c, under a written agreement signed by the defendant in the following words: "I guarantee the payment of any goods which Mr. John Stadt delivers to I. Nichols." It was objected, that this guarantee was void, because it did not express any consideration for the defendant's promise to an-

^a *Boydell v. Drummond*, 11 East, 142. ^c *Stadt v. Lill*, 1 Camp. N. P. C. 242.
^b *Wain v. Warlters*, 5 East, 10. 9 East, 348. S. C.

swer for the debt of another person; that, in order to ascertain whether there was any consideration expressed for this purpose, the proper way was, to consider, whether any action could have been brought on the supposed agreement, by the defendant against the plaintiff. But here there was no undertaking on the part of the latter to deliver goods to Nichols, and no action would have lain against him, had he refused to deliver any: *Ld. Ellenborough* said, that though by the agreement the plaintiff was not obliged to deliver goods, there appeared a sufficient consideration for the defendant's promise to be answerable, if any should be delivered; the stipulated delivery of the goods to Nichols was a consideration appearing on the face of the writing, and when the delivery took place, the consideration attached; he should therefore admit evidence of the delivery of the goods. *V. for plaintiff.* Upon an application to the court to set aside this verdict, the court said, that this case differed from *Wain v. Warlters*, as the agreement here contained the thing to be done by the plaintiff, which was the foundation of the defendant's promise; and that the delivery of the goods was a sufficient consideration, although no cross action upon the agreement could have been brought against the plaintiff, either at the suit of the defendant or of Nichols. *Rule nisi refused.*

17th section. "No contract for the sale of any goods, wares, and merchandises, for the price of ten pounds or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing, of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

No contract for the sale of any goods.] This branch of the statute extends to executory contracts, that is, contracts to be completed at a future time, as well as other contracts; but it is to be observed, that a distinction has been taken between those contracts, where the thing contracted for is existing *in solido*, and capable of being delivered at the time of the contract, and those, where it is requisite that something should be done, in order to put the thing into the state in which it is to be delivered according to the contract: the former have been holden to be within the statute, the latter not. This distinction will be illustrated by the following cases.

The defendant made a verbal agreement^d, to sell and deliver so many sacks of flour to the plaintiff, to be put in sacks (which the plaintiff was to send to the defendant's mill) and shipped on board vessels to be provided by the plaintiff for the purpose of exportation. The court were of opinion, that this contract was within the statute, and void; because the requisites of the statute had not been complied with.

The defendant, on the 4th of July, 1795^e, at Nottingham, sold to the plaintiff, by sample, fifty quarters of wheat, at four guineas per quarter; the wheat to be delivered by the defendant to the plaintiff, at Gainsborough. Two days afterwards, the defendant delivered to the plaintiff at N. the sample by which he had sold the wheat to him: but such sample was no part of the fifty quarters to be delivered at G. There was not any money paid by the plaintiff to the defendant in earnest, or any memorandum in writing. It was holden, that the contract was within the statute, and consequently void.

In trover for sheep^f, which the plaintiff had verbally agreed to buy of the defendant at Lewes fair, and to take them away at a certain hour; it appeared, that there was not any money paid, or any sheep delivered. The plaintiff not coming at the appointed time, nor sending for the sheep, the defendant sold them to another person. The court held, that the statute of frauds prevented any property from vesting in the plaintiff, so as to enable him to maintain trover, there being neither earnest or delivery, or any agreement in writing.

The defendant bespoke a chariot^g, and, when made, refused to take it. In an action for the value, Pratt C. J. held this not to be a case within the statute (11).

^d Rondeau v. Wyatt, 2 H. Bl. 63.

^e Cooper v. Elstou, 7 T. R. 14.

^f Alexander v. Comber, 1 H. Bl. 30.

^g Towers v. Sir J. Osborn, London sittings, Str. 506.

(11) "The case of Towers v. Osborn, when truly considered, was not a contract for the purchase of goods, but for the making something which had not any existence at the time." Per Lawrence J. 7 T. R. 17. "The case of Towers v. Osborn went upon the general principle, that executory contracts were not within the meaning of the statute. If by that were meant contracts for the sale of goods to be executed on a future day, such a construction

The defendant^h, on 13th October, 1766, agreed to deliver one load and a half of wheat to the plaintiff, within three weeks or a month from the time of the agreement, at the rate of twelve guineas a load, to be paid on delivery; *which wheat was understood, by both parties, to be at that time unthrashed.* No part of the wheat so sold was delivered; nor any money paid as earnest; nor any memorandum made in writing. The court, on a case reserved from Sussex assizes, were of opinion, on the authority of the preceding case of *Towers v. Osborn*, that this agreement was not within the statute; Yates J. observing, that the wheat was not thrashed at the time when the contract was made, and consequently, it could not be delivered at that time; therefore the statute did not apply.

Goods, wares, and merchandises.] The subject matter of the agreement must be taken with reference to the time of the bargainⁱ. Hence, if at that time the subject contracted for be an unsevered portion of the freehold, as a growing crop of grass^k, this section of the statute does not apply.

Except the buyer shall accept part of the goods so sold, and actually receive the same.] In order to take a contract for the sale of goods of the value of 10*l.* or upwards, out of the statute, there must be either an acceptance, by the vendee, of the whole or a part of the thing sold, or something given in earnest, or a part payment, of the consideration; otherwise the agreement must be reduced to writing in the manner specified by this section. Where goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery (12), but it may

^h *Clayton v. Andrews*, 4 Burr. 9101.
ⁱ Per *Ellenborough C. J.* 6 East, 610.

^k *Crosby v. Wadsworth*, 6 East, 602.

would be a repeal of the act: but if it only meant such contracts as were incapable of being executed at the time, then the decision was right; and such was the case then in judgment." Per *Grose J.* 7 T. R. 16.

(12) In an action for not delivering a quantity of rice, it appeared that the defendant had informed the plaintiff that defendant had a quantity of rice to sell; there was no evidence to prove any contract made, but the plaintiff produced an order on *Bennet and Co.* to deliver to him twenty barrels of rice, which was signed by defendant; and a witness proved, that defendant had told him that he had sold twenty barrels of rice to the plaintiff, at 17*s.* per hundred. The plaintiff then proved the delivery of the order for the rice to the warehouseman of *Bennet and Co.* The rice not having

be done by that which is tantamount, such as the delivery of a key of the warehouse, in which the goods are lodged, or by delivery of other indicia of property. So if the purchaser deals with the commodity, as if it were in his actual possession, this will supersede the necessity of proving actual delivery. Hence¹, after a bargain and sale of a stack of hay between the parties on the spot where the stack stood, evidence that the vendee actually sold part of it to another person (by whom, though against the vendee's approbation, it was taken away,) is sufficient to warrant the jury in finding a delivery to, and an acceptance by, the vendee, so as to take the case out of the statute.

So where a person having purchased a horse of a horse-dealer, desired him to keep the horse at livery for him, and the horse-dealer accepted the order, and put the horse out of his sale-stable into another stable; this was holden² to be a sufficient delivery, so as to take the case out of the statute.

A. having sent to B.³ a bale of sponge (in consequence of a verbal order from B.) for which he charged 11s. per pound, B. returned it, and at the same time wrote a letter to A., stating, that the sponge had been examined, and having been found not to be worth more than 6s. per pound, he had sent it back. It was holden, that there was not such an acceptance of the goods as would take the case out of the statute.

Where a sample is delivered to, and accepted by the purchaser⁴, and such sample is to be accounted for as part of the commodity sold; this will be considered as a sufficient acceptance and receiving of part of the goods, so as to take the case out of the statute.

Or that some note or memorandum in writing of the bargain be made, and signed by the parties to be charged by such

¹ Chaplin v. Rogers, 1 East, 192.
² Elmore v. Stone, 1 Taunt. 458.
³ Kent v. Huskinson, 3 Bos. & Pal.
 233.

⁴ Hinde v. Whitehouse and another,
 7 East, 558. Klinitz v. Surry, 5
 Esp. N. P. C. 267.

been taken away immediately, the defendant afterwards countermanded the delivery, in consequence of which Bennet and Co. refused to deliver the rice to the plaintiff, who sent for it some days after the order had been countermanded. Eyre C. J. was of opinion, that the order for delivery, directed to the persons in whose possession the rice was, amounted to a delivery, so as to take the case out of the statute. Searle v. Keeves, 2 Esp. N. P. C. 598.

contract or their agents]. An action on the case was brought against the defendants^p, for not accepting and paying for certain goods which they had contracted to purchase by the following memorandum in writing: "We agree to give Mr. Egerton 19*d.* per lb. for thirty bales of Smyrna cotton, customary allowance, cash three per cent, as soon as our certificate is complete. (Signed) Mathews and Turnbull; and dated the 2*d* of September, 1803." The defendants had before become bankrupts, and their certificate was then waiting for the Lord Chancellor's allowance, and after it was allowed they signed the memorandum again. It was objected on the authority of *Wain v. Warlters*, that the contract being altogether executory, and no consideration for the promise appearing on the face of the writing, nor any mutuality in the engagement, it was void; but the court overruled the objection on this ground, that the object and wording of the 17th section was different from that of the 4th section, in which the word *agreement* was introduced, and upon which the decision in *Wain v. Warlters* proceeded. And Lord Ellenborough C. J. observed, that in this case of *Egerton v. Mathews*, the words of the statute were satisfied, if there were some note or memorandum in writing, of the *bargain*, signed by the parties to be charged by such contract. And this was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it was all that the statute required (13).

Signed by the parties.] The place of the signature is immaterial. If a person draw up an agreement in his own handwriting, beginning, "I, A. B., agree, &c." and leave a place for a signature at the bottom, but does not sign it, the agreement will be considered as sufficiently signed^q. So, it seems, if a person be in the habit of printing instead of

^p *Egerton v. Mathews* and another, 6 ^q *Knight v. Crockford*, 1 Esp. N.P. C. East, 307. 190. per Eyre C. J.

(13) It will be observed, that in this case the name of the purchaser, as well as the seller, appeared in the memorandum, although the purchaser only regularly signed it; but in *Champion v. Plummer*, 1 Bos. & Pul. N. R. 252. where the seller only signed, and the name of the purchaser did not appear on the bill of parcels, it was holden, that the bill of parcels was an insufficient memorandum of the bargain, because there cannot be a contract without two parties.

writing his name, he may be said to sign by his printed name, as well as his written name^c.

In an action on the case for the non-delivery of a quantity of gin, bought of the defendants, it appeared, that at the time the order for the gin was given by the plaintiff to the defendants, a bill of parcels was delivered to the former, the printed part of which was, "London. Bought of Jackson and Hankin, distillers," and then followed, in writing, "1000 gallons of gin, 1 in 5. gin 7s. 350L." The name of the purchaser was inserted in the bill of parcels^d. About a month after, the defendants also wrote the following letter to the plaintiff: "Sir, we wish to know what time we shall send you part of your order, and shall be obliged for a little time in delivery of the remainder; must request you to return our pipes. Yours, &c. Jackson and Hankin." It was holden, that by connecting the bill of parcels with the subsequent letter of the defendants, the requisites of the statute were sufficiently complied with.

[*Or their agents thereunto lawfully authorized.*] The question, whether this (17th) section of the statute, comprehends contracts for the sale of goods by auction, as well as other sales, has not as yet been solemnly determined (14). Assuming, however, that sales by auctioneers or brokers are within the 17th section, it has been uniformly holden, ever since the case of *Simon v. Metivier*^e, that the auctioneer or broker is the agent of both parties, and a memorandum, made by him of the bargain, is a sufficient compliance with the terms of the statute, to make the contract of sale binding on

^c Per Eldon C. J. in *9 Bos. & Pul. 289.*

^d *Saunderson v. Jackson* and another,
2 Bos. & Pul. 238.

^e See *Champion v. Plummer*, 1 Bos. &
Pul. N. R. 254.

^f Per Ellenborough C. J. delivering
the opinion of the court in *Hinde v.*
Whitehouse, 7 East, 569.

(14) Lord Mansfield C. J. and Wilmot J. in *Simon v. Metivier*, 1 Bl. R. 599. were inclined to think, that sales by auction were not within the statute, on the ground, that the solemnity of that kind of sale, and the number of persons present, precluded all perjury as to the fact of sale. But see the judicious remarks of Ellenborough C. J. on this opinion, and the reasoning on which it is founded, in *Hinde v. Whitehouse*, 7 East, 569. See ante, p. 766. under the 4th clause of the 4th section, as to sales of land by auction.

each (15). But the memorandum by the auctioneer must be a sufficient memorandum; for where at a sale by auction of sugars, the auctioneer (having before him the printed catalogue of sale, containing the lots, marks, and number of hogsheads, and the gross weights of the sugars; and also another written paper containing the conditions of sale, which latter he read to the bidders, as the conditions on which the sugars were to be sold; but the two papers were neither externally annexed nor contained any internal reference to each other,) wrote down on the catalogue the name of the highest bidder, and the sum bid for the particular lots; it was holden*, that the minute made on the catalogue of sale, (which catalogue was not by any reference incorporated with the conditions of sale,) was not a sufficient memorandum of a bargain under those conditions of sale. But where goods were sold by auction to an agent^y, and the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue, and the principal afterwards, in a letter to the agent, recognised the purchase, it was holden, that the entry in the catalogue, and the letter, coupled together, were a sufficient memorandum of the contract.

In *Boydell v. Drummond*, 11 East, 142., it was holden, that the signature of the defendant, in a book entitled "Shakespeare Subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the Boydell Shakespeare, could not be connected with the prospectus, so as to take the case out of the statute, inasmuch as such connection could not be established without the intervention of parol evidence, and that would open a door for perjury, which it was the object of the statute to prevent.

If on a sale by auction of goods the same person is declared the highest bidder for several lots, a distinct contract

* *Hinde v. Whitehouse*, 7 East, 558. y *Phillimore v. Barry*, 1 Camp. N. P. C. 513.

(15) In like manner, the memorandum in a broker's book, and the bought and sold notes transcribed therefrom, and delivered to the buyers and sellers respectively, are sufficient to bind the bargain, the broker being considered as the agent of both parties. *Rucker v. Cammeyer*, 1 Esp. N. P. C. 105. ruled by Kenyon C. J. on the authority of *Simon v. Metivier*; and per *Ellenborough C. J.* in *Hinde v. Whitehouse*, 7 East, 569. S. P.

arises for each lot; and although all the lots together purchased by the same person exceed 10% in value, yet if the lots are separately of less value than 10% a memorandum in writing is not necessary^a.

It is to be observed, that neither the 4th nor 17th sections of this statute require, that the agent should be authorized *by writing*. A parol authority, therefore, is sufficient^a (16). But the character of agent cannot be supported by one of the contracting parties^b.

III. *The fifth and sixth Sections relating to the Execution and Revocation of Wills.*

5th Section.—"All devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by the custom of Kent, or of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect."

All devises of any lands or tenements.] Although these words are very general, yet it has been holden, that copyhold land^c and customary^d estates, passing by surrender, are not comprehended within them. In these cases, the estate is considered as passing by the surrender, of which the will only directs the uses. Consequently, it is not necessary that such will should be executed with the solemnities required by this statute. Hence, a mere draught of a will, the signing and publication of which were prevented by the

^a *Emmerson v. Heelis*, 2 Taunt. 38.

^a *Per Kenyon C. J. in Rucker v. Cammeyer*, 1 Esp. N. P. C. 106. See also *Emmerson v. Heelis*, 2 Taunt. 46.

^b *Wright v. Danaah*, 2 Camp. N. P. C. 202.

^c *Roe d. Gilman v. Heyhoe*, 2 Bl. R. 1114. See also the *Attorney-general v. Barnes*, 2 Vern. 598. *Attorney-*

general v. Andrews, 1 Ves. 225. *Tuffnell v. Page*, 2 Atk. 37.

^d *Doe d. Cook v. Danvers*, 7 East, 299. *Cary v. Askew*, coram Sir L. Kenyon, M. R. May 9, 1786. 2 Bro. C. C. 58. and in a note to *Wagstaff v. Wagstaff*, 2 P. Wms. 259. Cox's ed. recognized by *Ellenborough C. J. in 7 East*, 324.

(16) The third section, relating to assignments and surrenders of leases, &c. requires that the agent should be authorized by *writing*.

sudden death of the testator, has been holden sufficient to pass copyhold land surrendered to the use of the will.

N. By the 12th section of this statute, "*Estates pur auter vie* are devisable by will in writing, signed by the devisor, and attested by three witnesses, as in the fifth section."

Shall be in writing.] This provision is merely a repetition of what had been required by the stat. 32 H. 8. c. 1. which first gave the power of disposing of land by will. But writing was the only solemnity which that statute required (17). Hence, before the statute of frauds, short notes, taken by a lawyer from the testator's mouth, for the purpose of being reduced into form^e, were holden to be a good will, though the testator died before they were so reduced into form. In like manner, a scrap of writing, though it was not signed, sealed, or written, by the testator, might have been established as a will by the testimony of a single witness. This did in fact happen in a very remarkable case, that of Sir Francis Worsley's will^f. One Baynham, of Gray's Inn, wrote a will for Sir Francis Worsley, which will was in loose sheets, dictated by Sir Francis, who had neither signed nor sealed the same, though the writing itself purported both; but Sir Francis, who intended to write the same over again, had said, that in the mean time that should be his will. N. Baynham was the only witness: the court conceived this to be a sufficient will.

It has been conjectured by a very eminent lawyer^g, that the preceding case, which was decided in 18 Car. 2., might have occasioned the introducing the fifth section of the statute of frauds, the provision of which (*viz.* 1st, That the will shall be signed by the testator, and 2dly, That it shall be attested and subscribed by three credible witnesses in the presence of the testator) point directly at the two grievances in Sir Francis Worsley's case.

And signed by the party devising.] What shall be con-

^e 1 Anderson, 34. cited by Ld. Ellenborough C. J. 7 East, 324.

^f Reported in 1 Sidf. 315. pl. 33. 2 Keb. 126. pl. 82. by the name of Stephens,

lessee of Gerard v. Ld. Manchester, 18 Car. 2.

^g Ld. Camden in Hindson v. Kersey.

(17) Blackstone, in his commentaries, B. 2. c. 23. observes, that many frauds and perjuries were introduced by this stat. 32 H. 8. and remarks on the difficulty and hazard, even in matters of public utility, of departing from the rules of the common law, which are so nicely constructed and artificially connected, that the least breach in any one disorders for a time the texture of the whole.

sidered as a sufficient signature within this clause, will appear from the following cases^b. The deviser wrote his will with his own hand, thus: "I, John Stanley, make this my last will and testament," and thereby devised the land in question, and put his seal thereto, but did not subscribe his name. The will was subscribed by three witnesses in his presence. This was holden to be a good will to pass the land; for the will having been written by the deviser, and his name being in the will, it was a sufficient signing within the statute, which has not appropriated any particular place in the will, where it shall be signed, either at the top, or bottom, or in the margin (18).

It seems, that if the deviser cannot write, a mark made by him will be a sufficient signingⁱ within the statute (19).

Whether the deviser, by merely affixing his seal to the will, can be considered as having sufficiently signed within the meaning of the statute, seems to be a *vexata questio*. Affirmed per North, Wyndham, and Charlton, in Lemayne

^b Lemayne v. Stanley, 3 Lev. 1. Adjudged after several arguments by the whole court, sc. North C. J. Wyndham, Charlton, and Levinz, Js.

on special verdict in ejectment, Easter T. 1681. C. B.

ⁱ See in Lemayne v. Stanley, Freeman 538. a dictum to this effect.

(18) See the opinion of Lord Mansfield C. J. in *Right v. Price*, Doug. 241. where the will was prepared in five sheets, and a seal affixed to the last, and the form of attestation written upon it; and the will was read over to the testator, who set his mark to the two first sheets, and attempted to set it to the third, but being unable, from the weakness of his hand, he said he could not do it, but that it was his will; and, on the following day, being asked if he would sign his will, he said he would, and attempted to sign the two remaining sheets, but was not able. Lord Mansfield C. J. observed, that "the testator, when he signed the two first sheets, had an intention of signing the others, but was not able. He therefore did not mean the signature of the two first as the signature of the whole will: consequently there never was a signature as of the whole." N. The case was ultimately decided on another ground.

(19) See *Harrison v. Harrison*, 8 Ves. jun. 185. where it was holden by Lord Eldon C. on the authority of *Gurney v. Corbet**, C. B. 1710, that a will was duly executed to pass freehold land, although one witness only had subscribed his name, and the other two had attested by setting their marks. See also *Addy v. Grix*, coram Sir W. Grant M. R. 8 Ves. jun. 504. S. P.

* Not printed, but said by Lord Eldon to be in a note book which was the property of Mr. J. Barnet.

v. Stanley, 3 Lev. 1. Dub. per Levinz, S. C. Affirmed per Holt C. J. in *Lea v. Libb*, 1 Show. 69. Affirmed per Lord Raymond C. J. at *nisi prius*, in *Warneford v. Warneford*, 2 Str. 764. Negatived per three barons (including Parker C. B.) in *Smith v. Evans*, 1 Wils. 313.; also per Willes C. J. Sir John Strange M. R. and per Parker C. B. (20) sitting with Lord Hardwicke C. in *Ellis v. Smith*, as assistants, 1 Ves. jun. 11. 1 Dickens, 225.

It is not required by the statute, that the witnesses should see the devisor sign, or that he should sign in their presence^k. It is sufficient, that the devisor should declare to the witnesses, that the instrument offered to them to be subscribed is his will, and that the signature is his handwriting.

Attested and subscribed.] (21). It is not necessary, that the will should be attested and subscribed by all the witnesses at the same time. Hence, where the devisor published his

k *Grayson v. Atkinson*, 2 Ves. 454. *Ellis v. Smith*, 1 Ves. jun. 11. 1 Dickens, 225. S. C.

(20) Parker C. B. observed, however, (according to the report in 1 Ves. jun. 12.) that as in some cases it was thrown out obiter, that sealing was signing, and in *one case decreed*, that it was equal to signing, he should submit his opinion. But in *Dickens's Rep. of Ellis v. Smith*, vol. 1. p. 228. and in a MS. note, this remark does not appear; and Parker's dissent from the opinion of the three judges in *Lemayne v. Stanley*, and Lord Raymond in *Warneford v. Warneford*, stands unqualified.

(21) It is not necessary that the witnesses should be informed of the nature of the instrument they are about to attest, or that it is a will. Hence in *Trymmer v. Jackson*, determined in the Court of King's Bench upon a trial at bar* of an issue directed by the Court of Chancery, cited in 1 Ves. 487. recognised by Lord Hardwicke C. in *Rigden v. Vallier*, 2 Ves. 258. and by Denison J. in *Wallis v. Wallis*, *Lincoln summ. ass.* 1762. 4 Burn's E. L. p. 127. 6th ed., the witnesses to the will were induced, from words made use of by Anna Lordell, the testatrix, at the time of the execution, to believe, that the instrument they attested was a deed, and not a will. The testatrix delivered it "as her act and deed," and the words "sealed and delivered" were written above the place where the three witnesses were to subscribe their names. The court were of opinion, that this was a sufficient execution of the will.

* On the 7th of May, 1749. see Reg. Lib. B. 1749. p. 298.

will in the presence of two witnesses¹, who subscribed it in his presence, and some time after he sent for a third witness, and published it in his presence; the will was holden to be duly attested (22).

The devisor wrote upon a sheet of paper a devise of land, and subscribed the paper, but did not seal it; nor was it attested². On a subsequent day he wrote a memorandum on another side of the same sheet of paper, containing a bequest of personal estate, and subscribed this memorandum in the presence of three witnesses. He then took the sheet of paper in his hand, and declared it to be his last will, in the presence of the three witnesses, and then delivered it to them, and desired them to attest and subscribe it, in his presence, and in the presence of each other, which they accordingly did. It was holden, that this was to be considered as one entire instrument, though made at different times; and that it was duly executed and attested to pass the real estate; that the memorandum relating to personalty only, the having three witnesses must have been merely for the purpose of authenticating the former devise; and the court observed, that a person was not obliged to make his whole will at the same time.

In the case of *Stonehouse v. Evelyn*, at the Rolls, 3 P. Wms. 254. it was proved, that the three subscribing wit-

¹ *Jones v. Lake*, 16 G. 2. B. R. on special verdict in ejectment. 2 Atk. 176. n. S. P. admitted per Hardwicke C. 2 Ves. 458. ² *Carleton d. Griffin v. Griffin*, 1 Burr. 549. on a case reserved.

(23) "The case of witnesses attesting at different times is supported by so many authorities, that it may be considered as settled; yet I think it is a dangerous determination, and destructive of those barriers which the statute has erected against frauds and perjuries." Per Sir John Strange, M. R. 1 Ves. jun. 14.

It will be observed, that in *Jones v. Lake*, there was only one instrument, which was attested by three witnesses, but in *Lea v. Libb*, 1 Show. 68. 88. 3 Mod. 262. (best reported in Carth. 35.) where land was devised by a will subscribed by two witnesses, and afterwards a codicil was made, which confirmed all the devises in the will, and was subscribed by two witnesses, one of whom was a witness to the will; it was holden that the will and codicil together were not sufficient to pass the land; for the statute is express, that there ought to be three witnesses to every devise of land, and also that the witnesses should subscribe such devise in the presence of the devisor; but in the present instance, neither of these solemnities took place.

nesses to the will had subscribed their names in the presence of the testatrix; but one of them said he did not see the testatrix sign the will, but that she owned at the time when the witnesses subscribed, that the name signed to the will was her own hand-writing. This was holden to be sufficient by Sir Joseph Jekyll M. R.

Where a will consisted of two sheets of paper, and the first sheet was regularly connected with the second, and in the first sheet the testator devised land to trustees therein-after named upon trusts therein specified, and in the last sheet, which was duly executed and attested, appointed certain persons to be trustees; although the testator did not execute the first sheet, and the witnesses never saw it, it was the opinion of all the judges of England, that if the first sheet were in the room at the time of the execution of the second, that was sufficient.

In the presence of the devisor.] It is required by the statute, that the attestation and subscription of the witnesses should be in the presence of the devisor, in order to prevent another will being obtruded in the place of the true will; but it is sufficient, if it be proved, that the testator *might see* the witnesses subscribing their attestation; it is not necessary that it should be proved, that the testator did actually see the witnesses subscribe. Hence, where the devisor being in bed^a made his will, which he signed in the presence of three witnesses, but he being very ill, the witnesses withdrew into a gallery, and there subscribed their names as witnesses to the will. Between the gallery and the bed-chamber, where the devisor lay, there was a lobby with glass doors, and the glass broken in some places; it was proved, that the devisor *might see* from his bed where he lay (through the lobby and the broken glass windows) the table in the gallery, where the witnesses subscribed their names; it was adjudged, that the will was duly executed in the presence of the devisor, within the intent of the statute.

Honora Jenkins^b, having directed her will to be prepared, went to the office of her attorney at York, in order to execute it. H. J. being asthmatical, and the office very hot, she retired to her carriage in order to execute the will, the witnesses attending her, who after having seen her execute, returned into the office, to attest the will, and the carriage was put back to the window of the office; it was proved by

^a Bond v. Seawell, on case reserved, 3 Burr. 1773. 1 Bl. R. 407. Bull. N. P. 264. S. C. ^b Sheers v. Glascock, C. B. Carth. 31. Salk. 688. 1 Rep. C. Abr. 403. ^c Casson v. Dade, 1 Esp. C. C. 220.

a person who was in the carriage with H. J. that the testatrix *might* see what passed through the window of the office. Immediately after the attestation, one of the witnesses took the will to the testatrix, which she folded up and put into her pocket. Lord Thurlow Ch. thought the will well executed; and the case of *Sheers and Glasscock* was relied upon as an authority.

Although it is required by the statute^q, that the attestation of the witnesses should be in the presence of the devisor, yet it is not necessary, that it should be inserted in the form of the attestation, that the witnesses subscribed their names in the presence of the devisor; whether they did so subscribe is matter of evidence to be left to the jury^r. Hence, where the attestation was "signed, sealed, published, and declared, in the presence of us," the witnesses being dead, and their hand-writing proved; the court held that it was the province of the jury to determine upon circumstances, without any positive proof, whether the witnesses had subscribed in the presence of the devisor.

By three or four credible witnesses.] The witnesses must be persons who have the use of their reason, and such religious belief as to feel the obligation of an oath; who have not been convicted of any infamous crime, and are not influenced by interest (23).

1. The witnesses must be persons who have the use of their reason.

Persons excluded from giving testimony^t, for want of skill and discernment, are idiots, persons of insane mind, and children. In regard to children, there seems not to be any precise time or age fixed, before which they are excluded from giving evidence; this will depend in a great measure on the sense and understanding of the child, as it shall appear to the court upon examination of the infant.

2. The witnesses must be persons who have such religious belief as to be sensible of the obligation of an oath.

"It is said by Sir Edward Coke" (1 Inst. 6. b.), that an infidel is not to be admitted as a witness; the consequence of which would be, that a Jew, who acknowledges the Old

q *Brice v. Smith*, Willes, 1.

r *Hands v. James*, Comyn's R. 531.

s *Croft v. Pawlet*, Str. 1109.

t Gilb. Evid. 109.

u Hale P. C. 2 vol. 279.

Testament only, could not be a witness. But, I take it, that although the form of the oath, as administered according to the laws of England, is, "*tactis sacrosanctis Dei Evangeliiis*," by which it is presumed that the witness is a Christian; yet in cases of necessity, as in foreign contracts between merchant and merchant, frequently transacted by Jewish brokers, the testimony of a Jew, "*tacto libro legis Mosaiicae*," is not to be rejected, and is used (as I have been informed) among all nations."

The depositions of witnesses^x, professing the Gentoo religion, who were sworn according to the ceremonies of their religion, taken under a commission out of Chancery, were holden to be admissible in evidence, in the great case of *Omichund v. Barker*; Willes C. J. remarking, "that if an oath were merely a Christian institution; as baptism, the sacrament, and the like, he should have been compelled to admit, that none but a Christian could take an oath. But oaths were instituted long before Christianity, were made use of to the same purposes as now, were always held in the highest veneration, and were almost as old as the creation. *Juramentum* (according to Sir Edward Coke) *nihil aliud est quam Deum in testem vocare*; and, therefore, *nothing but the belief of a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take an oath*." In conformity with the preceding remarks, it has been holden, that the proper question to be put to a witness, in order to ground an objection to his competency^y, is not whether he believes in Jesus Christ, or the Holy Gospels, but whether he believes in God, the obligation of an oath, and a future state of rewards and punishments.

3. Persons who have been convicted of any infamous crime cannot be witnesses.

There are several crimes, the commission of which evince such a moral depravity, as utterly to exclude the offender from becoming a witness. Hence, where a person has been convicted of treason or felony, his testimony cannot be received in a court of justice. At the common law, a person convicted of petit larceny was holden not to be a competent witness, and consequently was incapable of attesting a devise of land^z. But now by stat. 31 G. 3. c. 35. reciting, that persons convicted of grand larceny are by their punishment restored to their credit as witnesses, it is enacted, "that no person shall be an incompetent witness by reason of a con-

^x *Omichund v. Barker*, Willes, 538.

^z *Pendock v. Mackinder*, Willes, 669.

^y *R. v. Taylor, Peake*, N. P. C. 17. per Buller J.

³ Wils. 18. S. C.

viction for petty larceny." Every species of the *crimen falsi*, as it is termed, such as perjury, forgery, and the like, renders persons convicted thereof incompetent to be witnesses. Standing in the pillory being the usual punishment inflicted on those who are convicted of the *crimen falsi*, it was formerly holden, that no person, who had suffered this punishment, or even had been sentenced to it, could be a witness; but the rule now laid down is, that it is the *crime* and not the *punishment*, which makes a man infamous; and consequently, although a person be sentenced to stand in the pillory, yet if it be not for an infamous offence, such person is still a competent witness^a. If one found guilty on an indictment for perjury at common law be pardoned by the king, he will be a good witness^b; because the king has power to take off every part of the punishment; but if a person be indicted of perjury on the stat. 5 Eliz. c. 9. and convicted, the king cannot restore such person to his competency as a witness; for the king is divested of that prerogative by the express words of the statute. In this case the disability forms a part of the judgment on the statute, viz. "that the oath of such person or persons, so offending, thenceforth shall not be received in any court of record within England or Wales, or the marches, until the judgment shall be reversed by attainr or otherwise^c." But on an indictment at common law, the disability is only a consequence of the infamous judgment^d. N. The party, who would object to the testimony of a witness, on the ground of his having been convicted of an infamous offence, must be prepared with a copy of the judgment, regularly entered upon the verdict of conviction; for, until such judgment is entered, the witness is not deprived of his legal privileges^e. A mere conviction, unless followed by a judgment, is not sufficient to destroy the competency of a witness^f. The admission of the witness, that he has been convicted of the offence, will not supersede the necessity of producing the record of conviction, or copy thereof^g.

4. The witnesses must not be biassed or influenced by interest.

Previously to the stat. 25 G. 2. c. 6. it was holden^h, that if one of the subscribing witnesses to a will of land was a le-

^a Chater v. Hawkins, 3 Lev. 486.

^b Gilb. Evid. 108. Dover v. Mestaer, B. R. M. T. 1803. London Sitings, Ellenborough C. J. ante, p. 593.

^c Co. Ent. 368. b. 2d ed.

^d Per Holt C. J. in R. v. Crosby, Salk. 689.

^e Peake's Evid. 128. 2d ed.

^f Lee v. Gansel, Cowp. 3.

^g R. v. Castell Careinion, 8 East, 77.

^h Holdfast d. Anstey v. Dowsing, Str. 1253.

gates named in the will, and the land was charged with the payment of the legacy, such witness, not having received the legacy, or otherwise discharged himself of his interest at the time of examination, was not a credible witness within the intent of the statute of frauds. Whether a witness, who was a creditor or a legatee, was competent to be examined in support of a will, containing a charge on the land for payment of debts and legacies, if after the death of the deviser, and before examination, he had received or released, or upon tender made had refused to receive, the debt or legacy, seems to have been a *verata questio*. Lee C. J. had expressed an opinion in *Anstey v. Dowling*, that the condition of the witness, *at the time of the attestation*, was the only thing to be regarded; and if the witness was interested at that time, nothing *ex post facto* could give effect to his attestation. Lord Hardwicke C., in the case of the Earl of Ailesbury's will, (cited by Lord Mansfield C. J. in 1 Burr. 427.) where the subscribing witnesses were legatees named in the will, (which contained a charge on the real estate for the payment of legacies,) but had released before examination, established the will. In *Wyndham v. Chetwynd*¹, the subscribing witnesses were creditors of the deviser, but their debts having been paid before examination, the court were of opinion, that these witnesses were credible within the intent of the statute.

In *Doe d. Hindson v. Kersey*², where the testator devised certain lands to trustees, to be applied to the use of such poor of a certain parish as by reason of infancy, impotence, or old age, were unable to work, and to place out the children of such poor, apprentices; and the three witnesses, who attested the will, were seised of lands in fee within the said parish, at the time of the attestation, but had conveyed away the same before the trial; the three puisne judges were of opinion, that the witnesses were credible witnesses within the intent of the statute; but Lord Camden C. J. expressed an elaborate opinion to the contrary, viz. 1. That the credibility was a necessary and substantial qualification *at the time of attestation*; 2. that, if the witness was incompetent at that time, he could not purge himself afterwards, either by release or payment, so as to set up the will; 3. that he could not be a witness in that case to establish any part of the will, but that the whole was void. The puisne judges differed with Lord Camden on the second position,

¹ *Wyndham v. Chetwynd*, 1 Burr. 414. 1 Bl. R. 65. special verdict.

² *Hindson v. Kersey*, C. B. on case re-

served from Westmorland assizes, 4 Burr. E. L. 97.

and, as it appears, decided the case on this ground: namely, that the witnesses were restored to their competency, by the removal of their interest before the time of examination (24). Having thus stated the several decisions, it will be proper to remark, that the discussion of this subject is now become matter of curious speculation rather than of use; for, in consequence of the doubts which had arisen, from the opinion expressed by Lee C. J. in *Anstey v. Dowsing*, the interference of the legislature was deemed necessary; and by stat. 25 G. 2. c. 6. it was enacted, "that if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate, other than charges on lands, &c. for payment of any debt or debts, shall be thereby given or made, such devise, &c. shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise, &c." And by s. 2. "In case, by any will or codicil, any lands, &c. shall be charged with debts; and any creditor, whose debt is so charged, shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act. Provided, that the credit of every such witness, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury, before whom any such witness shall

1 S. 6.

(24) The chronological statement of this subject is as follows: The case of *Holdfast d. Anstey v. Dowsing* was decided in B. R. Easter term, 19 G. 2. 1746. The decree of Lord Hardwicke on Lord Ailesbury's will was in 1748. The statute was made in the 25 G. 2. 1752. The judgment of the court in *Wyndham v. Chetwynd* was delivered by Lord Mansfield C. J. B. R. M. T. 31 G. 2. 1757.; the will, on which the question arose, being dated the 14th of May, 1750. The judgment in *Doe d. Hindson v. Kersey* was delivered by Ld. Camden C. J: C. B. in E. T. 5 G. 3. 1765; the will, on which the question arose, being dated the 16th of August, 1734. The two last-mentioned cases are arranged in the text, as if they had been decided before the statute 25 G. 2., because it does not appear that in either of them the decision was influenced by the provisions of that statute. In both cases, the wills had been executed before the statute.

"be examined, or his testimony or attestation made use of; or of the court of equity, in which the testimony or attestation of any such witness shall be made use of; in like manner as the credit of witnesses in all other cases ought to be considered of and determined."

It does not appear that the legislature^m, when they passed the statute of frauds, had in their contemplation executions of wills by blind men. It seems, however, that, in the case of a blind man, stronger evidence will be required than the mere attestation of signature, but it is not necessary, that the will should be read over to him in the presence of the attesting witnesses.

Of the proof by the subscribing witnesses.—To prove the due execution of a devise of lands, the original will must be produced, and one of the subscribing witnesses, if living, must be examined to prove, that the solemnities prescribed by the statute have been complied with, agreeably to the rule of law, that where a witness has subscribed an instrument, he must be produced, because it is the best evidence (25); and, even where the will is in the hands of the adverse

m Longchamp d. Goodfellow v. Fish, 2 N. R. 415.

(25) "Although the common course is to call one witness only to prove the willⁿ, yet that is only where there is no objection made to the execution of the will by the heir; for he is entitled to have all the witnesses examined, but then he must produce them; for the devisee need not produce more than one, if such witness shall prove all the requisites; and though they should all swear that the will was not duly executed, yet the devisee would be permitted to adduce evidence of circumstances to prove the due execution; as was the case of Austin and Willes, cited by Lord Hardwicke C. in Blacket and Widdrington, M. T. 11 G. 2. in which case, notwithstanding the three witnesses swore that the will was not duly executed, the devisee obtained a verdict†. In Pike and Bradbury‡, before Lord Raymond, upon an issue of *devisavit vel non*, the witnesses denying their hands, the devisee would have avoided calling them, but the C. J. obliged him to call them, whereupon the first and second denying their hands, it was contended that he should go no further; for it was argued, that though if you call one witness, who proves against you, you may call another, yet, if the second also prove against you, you can go no farther; but the chief justice permitted the devisee to call other witnesses to prove the will, and he obtained a verdict." Gilb. Evid. 69. Bull. N. P. 264.

* Per Lee C. J. in *Austey v. Dowstag*. See also the opinion of Kenyon C. J. in *Doe v. Smith*, 1 Esp. N. P. C. 391.

† See also *Lowe v. Jolliffe*, 1 Bl. R. 365. S. P.

‡ *Q. Pike v. Badmering*, cited in Str. 1096. and there said to have been determined by Pratt C. J.

party, who has notice to produce it, and in consequence of such notice does produce it at the trial, the party calling for it is bound to call one of the subscribing witnesses to prove it^a. If all the subscribing witnesses are dead, their handwriting and that of the devisor must be proved.

A devisee or executor in trust^b, who has acted, may be examined as a witness in support of the will. In like manner an executor, who does not take any beneficial interest under the will, is a competent witness to prove the sanity of the testator. So the wife of an acting executor, who does not take any beneficial interest under the will, is a competent witness to prove the execution of it^c.

If a person who is interested, execute a surrender or release of his interest^d, he may be examined as a witness, although the surrenderee, &c. refuse to accept the surrender or release.

6th Section.—"No devise in writing, of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil, in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions, in manner aforesaid; or unless the same be altered by some other will or codicil, in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same."

No devise in writing, of lands, &c. shall be revocable, otherwise than by some other will or codicil, in writing; or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same.] Having premised that before this statute, devises of lands, made under the particular customs of boroughs, or by virtue of the statute of wills (32 H. 8. c. 1.), might have been revoked by any *express* words without writing^e, the statute of wills having given power to any person seised in fee of lands, to devise such lands by will, *in writing*, but being silent as to revocations, I shall proceed to consider the several methods prescribed by the statute of frauds for the revocation of wills of lands, and then subjoin some remarks on implied revocations.

^a Per Lord Kenyon C. J. in a case cited by Lawrence J. in *Gordon v. Secretan*, 8 East, 548. ^b *Goodtitle v. Welford*, Doug. 159. ^c *Dyer*, 310. b. pl. 81. Adm. in *Symson v. Kirtou*, Cro. Jac. 115. and *Cranvell v. Sanders*, Cro. Jac. 497. ^d *Lowe v. Jolliffe*, 1 Bl. R. 365. ^e *Gilb. Dev.* 93. ed. 1739. ^f *Bettison v. Bromley*, 12 East, 250.

This section prescribes three methods, by which a devise of land may be revoked; either by another will or codicil in writing, or by other writing, declaring the intention of the devisor to revoke the former devise; or by burning, cancelling, &c. With respect to the first method, (the only subject now under consideration) it is to be observed, that the words, "signed in the presence of three or four witnesses," having been holden to refer to the next preceding words "*other writing*," only, and not to the words "*will or codicil in writing*," it is not necessary that a will, whereby a former will is revoked, should be signed by the devisor in the presence of three witnesses¹; but that a second will may operate as a revocation of a former, it is necessary, 1. That the second will should expressly revoke or be clearly inconsistent with the first devise, *quoad* the particular subject matter of such devise¹. If it be merely found, that another, or even a different disposition has been made by the testator from that which he had first willed, yet if it do not appear to the court, what that difference is, it will not be a revocation². 2. It is necessary that the second will should be subsisting and effective at the time of the death of the testator; consequently; if the second will be not executed with the formalities prescribed by the 5th section of the statute³, or if the second will be effectually cancelled in the life-time of the testator⁴, the first will shall operate, as if no other had existed (26). 3. As before the statute of frauds, parol declarations of an intention to revoke in future, were holden not to amount to a present revocation⁵, so, since the statute, such declarations, although executed with the formalities required by the statute, will not operate as a revocation⁶. 4. It is an established principle, that an instrument, which was intended to operate as a devise, if it cannot take effect as such, shall never operate as a revocation⁷.

¹ See *Heil v. Clerk*, 3 Mod. 218. recognised by Ld. Hardwicke C. in *Ellis v. Smith*, 4 Burn. E. L. 199.

² See Cox's note to *Onions v. Tyrer*, 1 P. Wms. 345.

³ *Hitchins v. Bassett*, Selk. 592. 1 Show. 537. 3 Mod. 903. Show. P. C. 146. *Harwood v. Goodright*, Cowp. 87. S. C. in C. B. 3 Wils. 497. 2 Bl. R. 937. and in Dom. Pro. 7 Bro. P.

C. p. 344. but in Tomlins's edit. p. 489. *Thomas v. Evans*, 2 East, 488.

⁴ *Eccleston v. Speke*, 1689, Carth. 81. *Onions v. Tyrer*, 1716, 1 P. Wms. 344.

⁵ *Goodright v. Glazier*, 4 Burr. 2519.

⁶ *Cranvill v. Saunders*, Cro. Jac. 497.

⁷ *Thomas v. Evans*, 2 East, 488.

⁸ *Exp. E. of Ilchester*, 7 Ves. jun. 348.

(26) Where an effective devise appears to have been once made in disinheritance of the heir at law, it will lie upon the heir to prove, that such devise has been effectively defeated. Cowp. 87.

Or other writing of the devisor declaring the same, signed in the presence of three or four witnesses]. I am not aware, that there has been any case decided upon an instrument of revocation, intended merely to operate as such, and not as a devise. It appears, however, to have been the opinion of Lord Cowper C. in *Onions v. Tyrer*, 1 P. Wms. 345. Cox's ed. that such an instrument would be effective, if signed by the devisor in the presence of three witnesses, as this clause directs, and without the other formalities required in the case of wills by the 5th section, viz. the attestation and subscription of the witnesses in the presence of the devisor.

3d. Method of express revocation. By burning, &c.—Or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent.] The acts here mentioned are in themselves equivocal acts; and, consequently, in order to make them operate as revocations, it must be shewn, that they were done *animo revocandi*, that is, with an intention to revoke: for unless that appears, the prior devise will not be revoked. Hence, if the devisor were to throw the ink upon his will, instead of the sand; though it might be a complete defacing of the instrument, it would not be a revocation; or suppose a person, having two wills of different dates by him, should direct the first will to be cancelled, and, through mistake, the person to whom the devisor gave his directions, should cancel the last will: such an act would not be a revocation of the last will: or, suppose a person, having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would not be a revocation of the devise contained in such part. The intention, therefore, must govern in such cases.

A., by will, duly executed and attested^d, devised land to trustees to several uses; and at the same time executed a duplicate thereof, with all the solemnities prescribed by the fifth section of this statute. Some time after, having been desirous to change one of his trustees, he ordered his will to be written over again, without any variation from the first, except only in the name of that trustee, and a clause revoking all former wills. When it was so written over, he executed it in the presence of three witnesses, and the three witnesses subscribed their names, but not in his presence, (as the 5th section directs). Some evidence was adduced, that the testator afterwards cancelled the duplicate of the

^c Per Ld. Mansfield C. J. in *Burtonshaw v. Gilbert*, Cowp. 52.
^d *Onions v. Tyrer*, 9 Vern. 741. Prec.

in Chan. 459. Gilb. Rep. 120. 1 Eq. Ca. Abr. 407. pl. 1. but best reported in P. Wms. vol. 1. p. 345. Cox's ed.

first will, by tearing off the seal. The question was, whether the cancelling the duplicate of the first will should be a revocation thereof within this clause. It was admitted, that if a deviser, having duplicates of his will, cancels one of them *animo revocandi*, this is a good revocation of the whole will, and of both the duplicates (27). But it was decreed in the present case, "*that it was plain the testator did not mean to revoke his former will by cancelling, but by substituting another perfect will in lieu thereof, and not otherwise; and, therefore, the cancelling thereof (if any) was but a circumstance shewing that he thought he had made a good disposition by the second will, and in confidence thereof it was done with no other intent, but that the second will should thereby more surely take place.*"

In order to effectuate a revocation^f, it is not necessary, that the will should be actually destroyed; hence, a slight tearing of a will, and throwing it on the fire, *with a deliberate intent to consume it*, by the testator, though it fell off and was preserved by a bystander without his consent or knowledge, has been holden to be a sufficient revocation.

A. having made a will of lands, and a duplicate thereof, (both duly executed and attested) but declaring that it was not a will to his liking, and that he should alter it, delivered the duplicate to B. (a devisee named therein). Afterwards A. executed another will, disposing of his estate in a different manner from what he had done under the former will, and thereby revoked all former wills, and at the same time cancelled the first will, which remained in his own custody, observing to the person who made the second will, that there was a duplicate of his first will in the hands of B. A short time before A.'s death, one of the principal devisees in the last will died; whereupon A. sent for an attorney to prepare another will, but before the attorney arrived A. became senseless, and shortly afterwards died. After his death, the first and second wills were found together in a paper, both cancelled; but the duplicate of the first will (which duplicate had been delivered to B.) was

^e Reg. Lib. B. 1716. fol. 242. Cox's P. ^f Bibb d. Male v. Thomas, 2 Bl. R. 1043.

^g Burtenshaw v. Gilbert, Cowp. 49.

(27) "Where there are duplicates of a will, one in the possession of the deviser, the other not; and the deviser cancels that which is in his custody, it is an effectual cancelling of both." Per Aston J. in *Burtenshaw v. Gilbert*, Cowp. 54.

found among some deeds and papers of the testator *uncancelled*. It did not appear, how the duplicate came to be found among the testator's papers. It was holden, that at the time of making the second will, the first was clearly revoked, and that it was not set up again by cancelling the second will.

The testator, after devising all his land^b to trustees upon trust to sell, "except the house at Bath," gave to his wife his house in Bath for her life, and after her death, to his eldest son, and after the execution of the will sold his house at Bath, and struck out of his will the exception and the devise respecting it. It was holden, that the devise to the trustees was not revoked by the erasure, as to the house at Bath (28). So where a testator by will duly executed and attestedⁱ, devised lands to A. and B., as joint tenants in fee, and afterwards struck out the name of B. by drawing a pen through it. It was holden, that the erasure was to be considered as a revocation of the devise *pro tanto* only (29).

A., by will duly executed and attested^h, devised land to B. and C. in trust, and afterwards struck out the name of C. and inserted the names of D. and E., leaving the general purposes of the trust unaltered, though varying in certain particulars, and did not republish his will. It was holden, that the intent of the testator appeared to be to revoke by the substitution of another good devise to the new trustees, and not by the obliteration; but such devise, not having been executed with the proper solemnities, would not operate as a revocation; and, admitting that the obliteration of the name of C. would have revoked the devise to C., yet the heir could not recover, inasmuch as the devise to B. re-

^h Sutton v. Sutton, Cowp. 812.

^k Short d. Gastrell v. Smith, 4 East, 419.

ⁱ Larkins v. Larkins, 3 Bos. & Pul. 16.

(28) If A. by his will devises all the residue of his personal estate to B. and C., and makes them executors; and after, by a codicil, cancels and revokes every thing relating to B., and also revokes the appointment of B. as executor, C. shall have the whole. A revocation, without a new gift, shall have the same effect as if it had been expressly given, and whether it be by codicil or obliteration, it is the same. *Humphries v. Taylor*, in Canc. Hil. 25 G. 2. 7 Bac. Abr. by Gwillim, p. 363.

(29) A mere change of trustees will not revoke a prior devise of the equitable estate. *Willet v. Sandford*, 1 Vez. 178. 186. *Doe v. Pott*, Doug. 710. *Watts v. Fullarton*, (cited) Doug. 718.

mained unrevoked, and competent to sustain all the trusts in the will in exclusion of the heir.

Having treated of the express acts of revocation mentioned in the statute, it will be proper to take notice of *implied revocations* (30).

Implied Revocations.—Although the section of the statute of frauds now under review has enumerated several methods by which a devise of lands may be revoked, and although it should seem to have been the intention of the legislature to have excluded every other method of revocation, yet has it been holden, that implied revocations are not within the statute.

Implied revocations, strictly so termed, are, 1st, when certain acts are done by the testator, inconsistent with or contradictory to the dispositions made by the will, so necessarily inferring an intention to revoke, that the law will presume such an intention. As where the deviser, by a subsequent deed, gives to the devisee in fee a lesser interest, e. g. an estate for years, to commence after the death of the deviser; in such case the intended devisee cannot have both interests; that which is conveyed by the deed must take effect, and, therefore, the law makes a necessary implication, that the first disposition, which is by the will, is revoked. In like manner, where the deviser having devised a reversion to A., afterwards grants the same to B., this will be a revocation, even though the lessee has not attorned. So where the testator having devised land to A. bargains and sells the same land to B., although the deed be not enrolled within six months, according to the statute, and, consequently, nothing can pass to the bargainee, yet this will amount to a revocation, because here is a solemn act done, whereby the testator has clearly evinced his intention, that the devisee should not have the land devised (31).

1 *Coke v. Bullock*, Cro. Jac. 49. cited in *Harkness v. Bayley*, Pr. Ch. 514. and 2 Atk. 72.

(30) For farther information on this subject, see *Gilb. Devises*, p. 93—103. Ed. 1739.

(31) I am not aware, that the two last mentioned instances have ever been solemnly decided. They are mentioned in 1 Roll. Abr. 615. (P.) pl. 5, 6. as the opinions of Popham and Gawdy Js.; but, from subsequent cases, where they have been cited, it appears that they have been considered as law. Gilbert has inserted them in his *Treatise on Devises*, p. 95, 96. ed. 1739.

9. It has been holden, that revocations are necessarily to be implied or presumed, from a total change in the circumstances of the testator's family after the execution of the will.

This head of revocation was originally borrowed from the civil law (32), and applied, in the first instance, to bequests of personal estate^m, and afterwards extended to devises of land, such revocation not having been considered as excluded by the provisions of the 6th section of the statute of frauds. What changes or alteration in the circumstances of the testator will be sufficient to work a revocation of a devise of land, may often be difficult to decide. It has, however, been solemnly determined, that a subsequent marriage and the birth of a child, *without provisionⁿ made for the objects of these relations*, is such a material change in the circumstances of the testator's family, as will work a revocation of a devise of land (33). And a posthumous child has been considered

^m Lugg, v. Lugg Salk. 592. Overbury v. Overbury, 2 Show. 242. ⁿ See exp. E. of Ilchester, 7 Vez. jun. 242.

(32) N. By the common law, before the statute of frauds, a subsequent marriage was holden to revoke a will of land made by a feme sole; although such marriage was had with the person in whose favour the will was made. *Forse v. Hemblinge*, 4 Rep. 60. b.

(33) An opinion had been expressed in *Brown v. Thompson*, at the Rolls, 8 Dec. 1731, by Sir John Trevor, M. R. and afterwards in the same case by Lord Keeper Wright, (1 P. Wms. 304. n. 1 Eq. Ca. Abr. 413.) that revocations of a devise of land might be implied from a subsequent marriage and birth of a child, notwithstanding the provision of the 6th section of the statute of frauds; but this point was not considered as settled until the case of *Christopher v. Christopher*, Exch. 1771, 2 Dickens, 446. when it was solemnly determined, by Adams B., Smythe B., and Parker C. B. against the opinion of Perrot B., who thought the case within the statute, and that the dispute concerning the reality of a subsequent marriage, and the legitimacy of children, was as open to perjury as any other, and that the statute intended an actual and not a presumptive revocation. The case of *Christopher v. Christopher* has been recognised in several subsequent cases, viz. in *Sprague v. Stone*, at the Cockpit, 27 March, 1773. Ambli. 721. *Brady v. Cubitt*, B. R. M. 1789, Doug. 31. *Doe v. Lancashire*, B. R. M. 1792, 5 T. R. 49.; and, lastly, in *Kenebel v. Sraffon*, B. R. T. 1802, 2 East, 530. N. Marriage alone, or the subsequent birth of children unprovided for alone, is not sufficient to operate as a revoca-

for this purpose in the same condition as a child born during the testator's life-time*.

This rule of revocation, like the preceding, was formerly considered as grounded upon a presumed alteration of intention in the testator; but in a modern case^o, *Ld. Kenyon C. J.* thought it was founded "on a tacit condition annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family" (34). But, upon whatever grounds this rule of revocation may be supposed to stand, it has been holden to apply only in cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. Hence^q, where *A.* devised certain lands to *B.* in trust, and directed him to pay, out of the rents and profits, an annuity to *M. S.* with whom he cohabited, and in case he should leave any child or children by *M. S.*, to raise a sum of money to be paid among his children, and then devised the remainder of his estate to several of his relatives; and afterwards *A.* married *M. S.* by whom he had several children; it was holden, that the will was not revoked; either, 1st, On the ground of a tacit condition annexed to the will, viz. that it should be void in the event of a marriage and children, *without provision*; inasmuch as that condition, viz. of marriage, and of the birth of children *unprovided for*, had not taken effect; or, 2dly, on the ground of an intention to revoke, to be presumed, in favour of a wife and children unprovided for; because the fact, upon which such presumption could be formed, did not exist in the present case (35).

^o *Doe v. Lancashire*, 5 T. R. 49.
^p *Ib.*

^q *Kenebel v. Scafton*, 2 East, 530.

tion of a will of a personal estate*. Per *Dr. Hay*, in *Shepherd v. Shepherd*, Hil. 1770; in the Prerogative Court.

(34) *Lord Ellenborough C. J.*, delivering the judgment of the court in *Kenebel v. Scafton*, seems to have approved of *Lord Kenyon's* opinion.

(35) Whether the revocation holden to arise from subsequent marriage and birth of a child, without provision made for these relations, can be rebutted by parol declarations in favour of the will, is a question which does not appear to be at rest. Affirmed per *Car.* in *Lugg v. Lugg*, *Ld. Raym.* 441. decided expressly in

^{to} *Jackson v. Hurlock*, M. 5 G. 3. *Ld. Northington C.*, S. P. Amb. 494.

^{sp} This was a case of personal estate.

Having endeavoured to illustrate the nature of implied revocations, strictly so called, it will be proper, in the next place, to take notice of those acts, by which a devise of land may more properly be said to be annulled than revoked; though the latter term is most frequently applied to this subject. The acts here alluded to are such, whereby a material alteration is made by the testator, in his seisin of the estate devised, after the execution of the will. The authorities on this subject are of very ancient date, beginning in the latter end of Queen Elizabeth's reign, and continued down in a regular series to the present time (36), with a few exceptions (37).

The rule to be collected from these authorities appears to be this, that *where a person seised of an estate, devises it, and afterwards conveys his whole interest, either by feoffment, lease and release, bargain and sale, fine, or recovery, though but for an instant, and though he takes back the estate to the same use as before, or though the old use results to him again, so as to descend in the same line as before, still the conveyance*

r E. of Lincoln's case, 2 Freem. 203. t Doe d. Lushington v. Bp. of Landaff, 2 N. R. 491.
 s Doe d. Dilnot v. Dilnot, 2 N. R. 401.

the affirmative in *Brady v. Cubitt*, Doug. 31. Affirmed per Eyre C. J. in *Goodtitle v. Otway*, 2 H. Bl. 522. Negated per Lord Alvanley M. R. in *Gibbons v. Caunt*, 4 Ves. jun. 848. and Lord Rosslyn C. in *Kenebel v. Scrafton*, 5 Ves. jun. 664.

(36) The most important case on this subject is, that of *Goodtitle v. Otway*, in which all the learning is collected. See the reports of this case in its several stages, 2 H. Bl. 516. 1 Bos. & Pul. 576. 7 T. R. 399. 2 Ves. jun. 604. n. 3 Ves. jun. 682. 7 Brown, P. C. Tomlins's ed. p. 593. See also *Harmood v. Oglander*, 6 Ves. jun. 199. and 8 Ves. jun. 106. and *Attorney-General v. Vigor*, 8 Ves. jun. 256.

(37) The exceptions here alluded to will be found in the case of *Webb v. Temple*, Freem. 542. and *Luther v. Kidby*, reported in Vin. Abr. tit. Devise, (R. 6.) pl. 30. In the latter case it was holden, that where A. and B. were tenants in common of lands in fee, and A., by will dated 25th January, 1719, devised his moiety in fee, and afterwards A. and B. made partition by deed, dated 16th May, 1722, and fine, declaring the use as to one moiety in severalty to A. in fee, and as to the other moiety in severalty to B. in fee, this deed of partition and fine was not a revocation of the will of A. See, however, the remarks of Heath J. on this case in *Goodtitle v. Otway*, 1 Bos. & Pull. 585. and of Lord Eldon C. in *Attorney-General v. Vigor*, 8 Ves. jun. 281.

operates to annul his will. This rule is founded on a technical principle of law, introduced, as it should seem, originally in favour of the heir: viz, that in order to render a devise valid and effectual, it is necessary that the seisin of the devisor should remain unaltered from the execution of the will until the death of the devisor (38). The foundation of the rule being wholly independent of the intention of the testator to revoke, the rule will operate where the provisions of the subsequent conveyance are consistent with the provisions of the will; and even where such conveyance is made for the express purpose of confirming the will. Hence, also, parol evidence to shew that the testator did not intend, by the subsequent conveyance, to revoke his will, is inadmissible^u. In conformity with the preceding rule^x, it has been holden, that where *the whole estate* is conveyed by lease and release to uses, although there be a resulting use in the ultimate reversion to the grantor by the same instrument, yet the conveyance will operate as a revocation of a prior will (39). It will be observed, that in the preceding instances, the *whole estate* was conveyed; and therefore the party did not die seised of that estate which he had at the

^u Goodtitle v. Otway, 2 H. Bl. 516.

^x Goodtitle v. Otway, 1 Bos. and Pul. 576. 7 T. R. 399.

(38) In this instance as in many others, the language of pleading is evidence of the law, viz. "that J. S. was seised of certain lands in his demesne as of fee, and being so seised on such a day made his last will and testament in writing, and thereby devised, &c.; and afterwards, to wit, on &c. the said J. S. died, *seised of the said lands in form aforesaid.*" See Co. Ent. 653. b. 654. a. 2d. ed.

(39) "So if a person seised of a real estate, devise it, and afterwards convey the legal estate, though there be only a partial declaration of trust, *yet as he has granted the whole estate*, it is a revocation of the will." Per Lord Hardwicke C. in Sparrow v. Hardcastle, 7 T. R. 417. n. But where tenant in tail, by bargain and sale, conveyed to J. S. in fee, in order to make him tenant to the præcipe in a common recovery, the use of which was declared to him in fee, and 8th June (Trinity term in that year having begun on the 7th June,) made his will, and afterwards a writ of entry was sued out returnable in Quind. Tr. (17th June) and the recovery suffered: it was holden, that the land passed by the will, on the ground that the deed and recovery made one conveyance only, of which the deed was the principal part; and that the whole of a conveyance should be taken together, and the several parts of it should relate back to the principal part. Selwyn v. Selwyn, 2 Burr. 1131. recognised by Lord Mansfield C. J. in Rœe d. Roden v. Griffiths, 4 Burr. 1962.

time of making his will; and consequently the devise, which will only operate upon that seisin, which the testator had at the time of making his will, was annulled or revoked: But where the devisor does not part with his whole estate, e. g. where he grants an estate for years only, to the devisee, to commence in the life of the devisor, in such case, the conveyance will not operate as a revocation of the fee. In like manner, if a man devises land in fee to A., and afterwards makes a mortgage thereof in fee, either to the devisee or a stranger, this mortgage in fee, though a revocation of the will in law, will not operate as such in equity, and the right of redemption will pass by the will. And the same rule holds in equity with respect to a conveyance in fee for payment of debts.

y 2 Atk. 72.

z Baxter v. Dyer, 5 Ves. jun. 656.

a-Admitted to be a settled point in
York v. Stone, Salk. 158. Adjudged
by Sir John Churchill M. R. and

Ld. Jeffries C. in Hall v. Dunch,
1 Vern. 399. 342.

b Adm. in Cave v. Holford, 3 Ves.
jun. 654.

CHAP. XXIII.

GAME.

- I. *Of the Right of taking and destroying the Game at Common Law, and of the Restraints imposed on the Exercise of such Right by Statute.*
- II. *Of the Appointment and Authority of Gamekeepers.*
- III. *Of the Statutes 5 Ann. c. 14.—9 Ann. c. 25.—28 G. 2. c. 12. relating to the Preservation of the Game; the Penalties imposed for Offences against these Statutes; the Modes of recovering the Penalties, 1st, By Distress—2dly, By Action of Debt, and herein of the Stat. 8 G. 1. c. 19.—26 G. 2. c. 2.—2 G. 3. c. 19.*
- IV. *Of the Statutes relating to the Destruction of the Game at improper Seasons of the Year, Stat. 2 G. 3. c. 19.—13 G. 3. c. 55.—39 G. 3. c. 34.—Declaration—Evidence.*
- V. *Of the Duties made payable in respect of killing Game.*

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- I. *Of the Right of taking and destroying the Game at Common Law, and of the Restraints imposed on the Exercise of such Right by Statute.*

IT has been asserted by Sir W. Blackstone in his Commentaries (vol. 2. p. 14, 15, 417, vol. 4, p. 174.), that by the common law, the sole property of all the game in England is vested in the king alone, and that the sole right of taking

and destroying the game belongs exclusively to the king; and, consequently that no person, of whatever estate or degree, has a right to kill game, even upon his own land, unless by licence or grant from the king. This position, which the learned commentator has embraced every opportunity of introducing, has been controverted successfully by Mr. Christian, in a note to his edition of the Commentaries, 2 vol. p. 419. n. 10., and it may now be ranked among those erroneous doctrines, which (it must be admitted) will, upon a careful examination, be found in those books; but which were almost unavoidable in a work of so comprehensive a nature. Presuming then that the right of taking and destroying the game belongs to the subject, at common law, I shall proceed to shew how far it has been abridged by statute; having premised that this right can only be exercised on a person's own estate, and that not even a lord of a manor (1), or his gamekeeper, can go into any part of the manor, which is not the lord's own estate or waste, without being a trespasser, as any other person would be; unless a right of entry in pursuit of the game be specially reserved to him.

By stat. 22 & 23 Car. 2. c. 25. s. 3. (2) "Every person, not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the *clear* yearly value of 100*l.* per annum, or for term of life, or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150*l.* (other than the son and heir apparent of an esquire, or other person of higher degree, and the owners and keepers of forests, parks, chases, or warrens,) is prohibited from having, keeping, or using any guns, bows, greyhounds, setting dogs, ferrets, coney dogs, lurchers, hays, nets, lowbels, harepipes, gins, snares, or other engines aforesaid."

(1) It has been justly remarked by Mr. Christian, that the common opinion, that the lord of the manor has a peculiar right to the game, superior to that of any other duly qualified land-owner within the manor, is erroneous. He conceives that this opinion owes its rise to the power which lords of manors have of appointing gamekeepers, a power originally given to them by stat. 22 & 23 Car. 2. c. 25., the first statute in which lords of manors are distinguished from other land-owners with respect to the game.

(2) Prior qualification acts are 13 R. 2. stat. 1. c. 13.—1 Jac. 1. c. 27. s. 6. repealed by 7 Jac. 1. c. 11. s. 6, and 3 Jac. 1. c. 13. s. 5. relating to deers and conies only. The provisions of these statutes (which remain un repealed, but are seldom put in force) will be found under title *Game* in Burn's Justice.

In the construction of this statute, it has been holden, that it is not necessary that the estate should be a freehold, or that it should be a legal estate^a; for a copyhold estate or an equitable estate of inheritance, of the clear yearly value of 100*l.* is a qualification. But it is not sufficient, if the rent of the estate be reduced below the sum required by paying the interest of a mortgage^b (3), or if the estate be an estate for life only, under the yearly value of 150*l.*^c (4)

A lease for 99 years^d, dependent on three lives, of the value of 150*l.* per annum, though neither a lease for life, nor a lease for 99 years certain, has been holden to be a sufficient qualification within this statute; because there is not any reasonable probability of any life in being extending beyond 99 years; and the legislature, in admitting leases for 99 years, of a certain value, to be a qualification, did not mean to require that they should positively endure so long; it was sufficient if they might extend to that period, subject to the contingency of the party's so long living.

Doubts had been entertained whether the words *other person* in this statute should be taken to be in the nominative or in the genitive case; but it was solemnly determined in *R. v. Utley*, 24 G. 3. B. R. recognised in *Jones v. Smart*, 1 T. R. 44. that these words must be taken to be in the genitive case, in the same manner as if the word "of" had been actually inserted, and that the meaning of the statute is "other than the son and heir apparent of an esquire, or the son of any other person of higher degree." It follows, as a necessary consequence from this interpretation of the statute, that although the son and heir apparent of an esquire, or of other person of higher degree, be qualified by virtue of this statute, yet an esquire or person of higher degree, *as such*, is not qualified.

^a *Wetherill v. Hall*, Cald. 230.

^c *Lowndes v. Lewis*, Cald. 188.

^b *Wetherill v. Hall*, B. R. M. 23 G. 3.

^d *E. of Ferrers v. Henton*, 8 T. R. 506.

cited in a note to *R. v. Clarke*, 8 T. R. 221. Cald. 230. S. C.

(3) On a question arising upon an information before magistrates, as to the defendant being qualified, the magistrates may ground their opinion of his not being qualified on the fact of the defendant's having sworn on a former day under the income act to an estate under 100*l.* per annum. *R. v. Clarke*, 8 T. R. 220.

(4) A vicar, in right of his church, has not an estate of inheritance, but for his life only; consequently such estate must be of the value of 150*l.* per annum, in order to exempt him from the penalties of these statutes. *Lowndes v. Lewis*, Cald. 188.

A diploma conferring the degree of doctor of physic, granted by either of the universities in Scotland, does not give a qualification to kill game under this statute.

A commission of captain of volunteers signed by the lord lieutenant of a county does not confer the degree of esquire; and consequently the son of such captain is not thereby qualified to kill game.

II. *Of the Appointment and Authority of Gamekeepers.*

THE stat. 22 & 23 C. 2. c. 25. s. 2. authorises lords of manors, or of other royalties, not under the degree of an esquire, to appoint by writing under their hands and seals, gamekeepers within their manors or royalties, who may seize guns, dogs, nets, and other engines used for the destruction of the game by unqualified persons within the precincts of their manors, and the said gamekeepers, or other persons authorized by a warrant from J. P. may search in the day-time the houses of unqualified persons, upon good ground of suspicion, and seize for the use of the lord, or destroy such guns, dogs, nets, &c.

The preceding statute does not limit the number of gamekeepers, which may be appointed for each manor. But by stat. 9 Ann. c. 25. s. 1. lords of manors can appoint (5) only one gamekeeper for one manor; and further, the name of each gamekeeper must be entered with the clerk of the peace, &c. Such gamekeeper, by stat. 3 Geo. 1. c. 11., must have been either a person qualified, or a servant of the lord, or a person immediately employed to kill game for the sole use of the lord.

But now by stat. 48 G. 3. c. 93. s. 2. any lord or lady of a manor may depute any person, whether acting as a gamekeeper to any other person or not, or whether retained and paid for as the male servant of any other person or not, or

c Jones v. Smart, 1 T. B. 44.

f Talbot v. Eagle, 1 Taunt. 510.

(5) "A lord of a manor cannot convey to another the power of appointing a gamekeeper, without a conveyance also of the manor itself. Such a power is a mere emanation of the manor, and inseparable from it." Per Lord Kenyon C. J. 5 T. R. 20.

whether a qualified person or not, to be a gamekeeper to any such manor, with authority to such person as gamekeeper, to kill game within the same, for his own use, or for the use of any other person, to be specified in such appointment or deputation, whether qualified or not.

By stat. 25 G. 3. c. 50. s. 2. deputations of gamekeepers must be registered with the clerk of the peace, &c. and certificates thereof (stamp duty one guinea, that is, 10s. 6d. by this statute, and 10s. 6d. by stat. 31 G. 3. c. 21.) must be taken out annually; and a penalty of 20*l.* is imposed on gamekeepers neglecting to register their deputations within 20 days after they are granted, and neglecting to take out their certificates.

A deputation to a gamekeeper, who is neither himself qualified to kill game^g, nor is a servant to the lord of the manor, need not state on the face of it, that he is appointed to kill game for the use of the lord; and it will be presumed, that whatever game he kills is for the lord's use till the contrary is proved. N. This case occurred before the stat. 48 G. 3. c. 93.

The stat. 4 and 5 W. & M. c. 23. s. 4. gives to lords of manors, or their gamekeepers, the same protection in resisting offenders within the precincts of their manors in the night-time, as the law affords to the keepers of ancient chases, parks, or warrens.

It is no defence to actions of debt for penalties on the game laws^h, that the defendant acted *bona fide* as gamekeeper of the manor, in which the offence was committed, under a deputation from a person claiming a right to appoint the gamekeeper, there not being any ground for such claim.

A question respecting the boundaries of a manorⁱ, or the right to a manor^k, cannot be tried in an action on the game laws.

g *Spurrier v. Vale*, 1 Camp. N. P. C. 457. 10 East, 413.

h *Calcraft v. Gibbs*, 5 T. R. 19.

i *Hankins v. Bailey*, per Buller J. Somerset Sur. Ass. 1791.

k *Blunt v. Grimes*, per Buller J. Wiltshire Lent Ass. 1789, cited in *Calcraft v. Gibbs*, 4 T. R. 601.

**III. Of the Statutes 5 Ann. c. 14.—9 Ann. c. 25.—
28 G. 2. c. 12. relating to the Preservation of
the Game; the Penalties imposed for Offences
against these Statutes; the Modes of recovering
the Penalties, 1st, By Distress, 2dly, By Action
of Debt, and herein of the Stat. 8 G. 1. c. 19.
—26 G. 2. c. 2.—2 G. 3. c. 19.**

By stat. 5 Ann. c. 14. (made perpetual by stat. 9 Ann. c. 25.) s. 2. "every higler, chapman¹, carrier, inn-keeper, victualler, or alehouse keeper, (6) who shall have in his custody or possession any hare, pheasant, partridge, moor, heath-game, or grouse, or shall buy, sell, or offer to sell, any hare, &c. unless such game in the hands of such carrier be sent up by a person qualified to kill the game, shall, upon every such offence, be carried before some J. P. for the county, city, &c. where the offence is committed, and being convicted upon view, or upon the oath of one or more credible witnesses, shall forfeit for every hare, &c. the sum of 5*l.*; one half to the informer, and the other half to the poor of the parish where the offence is committed; (the subsequent part of this section directs, that the penalty shall be levied by distress, and for want of distress, the offender shall be punished by three months imprisonment for the first, and by four months for the second offence, and that

¹ See *Kearle v. Boulter*, Say. R. 191.

(6) By a subsequent stat. 28 G. 2. c. 12. (reciting the stat. 5 Ann. c. 14.) "Persons, qualified or not qualified, selling, exposing, or offering to sale, any hare, pheasant, partridge, moor, heath-game, or grouse, are for every such offence made liable to the same forfeitures and penalties as are inflicted by the recited act upon higlers," &c. And,* "if any hare, pheasant, partridge, &c. shall be found in the shop, house, or possession of any poulterer, salesman, fishmonger, cook, or pastry cook, the same shall be adjudged to be an exposing thereof to sale within the meaning of this act, and the recited act, or any other act; the forfeitures to be recovered and penalties inflicted to be applied in manner prescribed by the recited act, or by any other act since made for the preservation of the game."

* S. 2.

before the allowance of any certiorari to remove conviction under this statute, the party convicted shall enter into a recognizance, with sureties, conditioned for the payment of costs to the prosecutor within fourteen days after conviction or procedendo granted, and in default thereof, J. P. may proceed to execution, &c.) And for the better discovery of offenders, "any person who shall destroy, sell, or buy any hare, &c. and shall within three months make discovery of any higher, &c. (who hath bought or sold, or offered to buy or sell, or had in his possession, any hare, &c. so as the offender shall be convicted), shall be discharged of all penalties, and entitled to all the advantages of an informer under this statute."

"If any person, not qualified, shall keep or use any greyhound, setting dogs, hayes, lurchers (7), tunnel or other engines (8) to kill and destroy the game, and shall be thereof

m S. 3.

n S. 4.

(7) A hound is not within this statute, not being expressly mentioned, and the words "other engines" coming after tunnells, are applicable to inanimate things only. *Hooker v. Wilks*, Str. 1126.

(8) "As greyhounds, setting dogs, hayes, lurchers, and tunnells are expressly mentioned, in this statute, it is not necessary to allege that any of these have been used for killing or destroying the game; and the rather, as they can scarcely be kept for any other purpose than to kill or destroy the game; but as guns are not expressly mentioned, and as a gun may be kept for the defence of a man's house, and for other lawful purposes, it is necessary to allege, in order to its being comprehended within the meaning of the words, "any other engines to kill the game," that the gun had been used for killing the game." Per Lee C. J. in *Wingfield v. Stratford*, Say. R. 15. N. "If a person go in pursuit of game with a dog and gun on the same day, he can only be convicted in one penalty." Per Ld. Kenyon C. J. in *R. v. Lovet*, 7 T. R. 153. In *Molton v. Cheeseley*, 1 Esp. N. P. C. 123, it was proved that a pheasant had been killed by accident by the defendant's dog; and the defendant had afterwards carried it away. Two penalties were sought to be recovered, one for having the pheasant in his possession, not being qualified, the other for keeping a dog to kill game. Mr. Justice Butler is said to have ruled that the plaintiff could go for one penalty only, "for that both offences being by the same act, the plaintiff could recover but one penalty under the same statute." The wording being equivocal, it was considered at first, as if by the word act was to be understood statute; which, it was agreed on all hands, could not have been ruled by the learned judge, who probably said that two penalties could not be recovered under this

convicted upon the oath of one or two credible witnesses, by the justice or justices of the peace where such offence is committed, the person so convicted shall forfeit 5*l.*; one-half to be paid to the informer, and the other half to the poor of the parish where the same was committed;" (the subsequent part of this section prescribes the like mode of execution as is prescribed in the second section, and then proceeds to enact, "that J. P. within their districts, and lords and ladies of manors, within their manors, may take away any such hare, &c. from any such higler, &c. or other person not qualified to kill the same; and may take to their own use such dogs, nets, or other engines in the power or custody of persons not qualified to keep (9) the same;") "and lords and ladies of manors may, by writing, under hand and seal, empower their gamekeepers upon their manors to kill any game; but that such gamekeepers who shall under colour of authority kill or take game, and afterwards sell the same to any person, without the consent of their lords, and shall be convicted thereof upon complaint by the lord of the manor, upon the oath of one or more witnesses before a J. P., shall be committed to the house of correction for three months, &c."

By a subsequent statute^o, "if any hare, pheasant, partridge, &c. shall be found in the shop, house, or possession (10) of any person not qualified in his own right to kill game,

^o Stat. 9 Ann. c. 25. s. 2.

statute for the same act done by the defendant. N. A farmer who keeps a setting-dog for his landlord, is not to be considered as keeping a dog for the destruction of the game within this statute. *Reed v. Phelps*, B. R. E. 52 G. 3. MS.

(9) A justice of the peace under this stat. cannot seize the gun of a gamekeeper, although he is sporting for the purpose of killing game in another manor than that for which he has received his deputation; for the power of seizure under this act extends to those persons only who are not qualified to keep engines for the destruction of the game, and gamekeepers are qualified to keep such engines *any where*. *Rogers v. Carter*, C. B. 2 Wils. 387. It was admitted, however, in this case, that if the gamekeeper had actually killed game beyond the limits of his own manor, he would have been liable to the penalties of this statute.

(10) The plaintiff declared in debt for the 5*l.* penalty given by this stat. against the defendant for *exposing to sale* a hare, not being qualified in his own right to kill game, nor entitled thereto under any person so qualified. At the trial, it was proved that the plains

or being entitled thereto under some person so qualified, the same shall be adjudged to be an exposing to sale within the meaning of this act and the statute 5 Ann. c. 14." And by a. 3. "if any person shall take, kill, or destroy any hare, &c. in the night time, the person so offending shall, for every such offence, incur the forfeitures" mentioned in the stat. 5 Ann. c. 14.^p

By the preceding statutes, the penalties are given half to the common informer, and half to the poor of the parish, upon summary conviction. But by stat. 8 G. 1. c. 19. s. 1. it is enacted, that for the recovery of the penalties, *an action of debt* may be brought in any of the king's courts of record before the end of the next term after the offence committed, and the plaintiff, if he recover, shall be entitled to double costs. It is, however, expressly provided by this statute, that the party shall not be prosecuted twice for the same offence, *i. e.* both by action and upon summary conviction. The time limited by the last mentioned stat. 8 G. 1. c. 19. for bringing such action, viz. "before the end of the next term after the offence committed," having been found inconvenient, and in many cases not sufficient, it was enacted by stat. 26 G. 2. c. 2. that such action might be brought "before the end of the second term^q after the offence committed."

^p See further provisions for the preservation of game during the night-time, and on Sunday and Christmas day, 12 G. 3. c. 30. and 40 G. 3. c. 50.
^q See post, n. (11).

tiff went out coursing, and killed a hare on Shipston manor, when the defendant, who was employed as a carpenter and woodman by Mr. Earl, the lord of the manor, and had directions from him to detect poachers, came up and took the hare from the dog, and carried it away, notwithstanding the plaintiff claimed it, to Mr. Earl's steward according to his instructions. It was holden, that the possession of the defendant was not such as constituted an offence and subjected him to the penalty under the statute; Ld. Ellenborough C. J. observing, that the defendant did not claim the hare as his property nor acquire the possession of it for himself, but for his master, on whose manor it was taken; and if this were an offence, no case could be stated in which an unqualified person could innocently come in contact with game. It might as well be said that if a qualified man returning home with a bag of game were to fall from his horse, another person could not lawfully take up the bag, in order to assist the owner. Grose J. added that the possession of the game by the defendant was rather for the purpose of protecting the game, than in breach of the laws for preserving it. *Warneford v. Kendall*, 10 East, 12.

It having been found difficult to maintain the action of debt given by the statute 8 G. 1. c. 19. because the evidence of the rated inhabitants of the parish (to the poor of which the moiety of the penalty was directed by stat. 5 Ann. c. 14. to be applied) was disallowed; the interference of the legislature was again deemed necessary, and it was enacted by stat. 2 G. 3. c. 19. s. 5. "that any person might sue for and recover the whole of the penalty for his own use by action of debt, or on the case, to be brought within six months^a, i. e. lunar months, after the offence committed, in any of his Majesty's courts of record at Westminster, and that the plaintiff, if he recovered, should have double costs, and that no part of the penalty should be paid or applied to the use of the poor of the parish wherein the offence was committed." It is to be observed, that this statute gives the whole penalty to the informer, and not merely the other half, in addition to the one half, which was recoverable by him in an action of debt under stat. 8 G. 1. c. 19.

IV. Of the Statutes relating to the Destruction of the Game at improper Seasons of the Year—Stat. 2 G. 3. c. 19.—13 G. 3. c. 55.—39 G. 3. c. 34.—Declaration—Evidence.

"Persons taking, killing, destroying, carrying, selling, buying, or having in their possession or use, any partridge within the kingdom of Great Britain, between the first day of February and the first day of September^t; or any pheasant between the first day of February and the first day of October^u, excepting pheasants taken in the season allowed, and kept in a mew or breeding place, are subject to a penalty of 5*l.* for every bird."

By stat. 13 G. 3. c. 55. a similar provision is made for the preservation of black game between the 10th of December and the 20th of August, and red game between the 10th of December and the 12th of August; but the penalty imposed on persons offending against this last-mentioned statute is, for the first offence, a sum not exceeding 20*l.* nor less than 10*l.* and for every subsequent offence, a sum not exceeding

^r See *Partman v. Quiden*, *Sey. R.* 179. ^t Stat. 39 G. 3. c. 34. s. 2.
^a S. 6. ^u Stat. 2 G. 3. c. 19. s. 1.

30l. nor less than 20l. recoverable by action of debt, at the suit of any person, in any of the King's courts of record at Westminster, or great sessions in Wales; the action to be commenced within six CALENDAR MONTHS after the act committed, to which defendant may plead the general issue, and give the special matter in evidence. It is provided further, by this statute², that if the plaintiff be nonsuited or discontinued, or if there be a verdict for defendant, or judgment against plaintiff on demurrer, the defendant shall be entitled to treble costs.

Declaration.

In an action on the statutes for the preservation of the game, it is usually stated in the declaration, that the defendant, six months next before the commencement of the action (11), kept a gun, or snare, &c. as the case may be, for the destruction of the game, the defendant not being a person qualified by the laws of the realm (12)

x s. 12.

(11) It is usual, but not necessary, to allege, that the action was commenced within the limited time; it must, however, be proved at the trial to have been so commenced. If the time has lapsed, the defendant may take advantage of it on the plea of *nil debet*. It will be proper to remark, that by stat. 26 G. 2. c. 2. the action must be commenced before the end of the second term after the offence committed; and by stat. 2 G. 3. c. 19. s. 5. within six months (by which must be understood lunar months). In *Lee v. Clarke*^{*}, it was objected, on error after verdict, 1st, that the declaration alleged the action to have been commenced within six *calendar* months instead of *lunar* months; and 2dly, that it was not averred that the action was commenced within two terms, as well as within six months. In support of this objection, it was contended, that though the last statute (2 G. 3. c. 19.) says within six months, yet that would not in all cases extend the time given by the former statute, so that the latter only operated as a repeal *pro tanto*, and both statutes were still in force, and must be taken to have limited the action to be commenced within six months, provided it did not extend beyond two terms; that the words in stat. 2 G. 3. c. 19. were negative words, and not words of extension. But the court overruled the objections, observing that the allegations were not material, and that the court could not presume, that the fact was not proved to have happened within the time prescribed by law for the commencement of the action.

(12) It is not necessary in actions to negative the qualifications

^{*} 2 East, 333.

so to do contrary to the form of the statute (13), whereby and by force of the statute (14), an action hath accrued, &c.

In an action on stat. 5 Ann. c. 14. for keeping and using a dog to kill game, it must be stated in the declaration what sort of dog it was⁷.

In an action on the stat. 9 Ann. c. 25, for exposing a hare to sale it is sufficient to allege, that the defendant, not being a person qualified in his own right to kill game⁸, nor being entitled thereto under a person so qualified, *had a hare in his possession*; for, by s. 2. if a hare be found in the possession of such person, it shall be deemed an exposing to sale. But see *Warneford v. Kendall*, ante n. (10) as to the circum-

y *Reason v. Lisle*, Comyn's R. 576. s. *Jones q. t. v. Bishop*, Say. R. 64.

specially. *Bluet q. t. v. Needs*, Comyn's R. 522. The modern practice is in conformity to this decision, against the authority of which, however, *Foster J.* in *R. v. Jarvis* inclined. See 1 *East's R.* 647. n. A different rule holds in the case of convictions on this statute, for there the qualification must be specifically negated. *R. v. Jarvis*, H. 30 G. 2. B. R. cited by *Kenyon C. J.* from *Dunning's* note in 1 *East*, 643. *R. v. Earnshaw*, E. 52 G. 3.

(13) Where an action is founded on a statute, it is necessary in some manner to shew that the offence on which the party proceeds, is an offence against the statute; and if it be not shewn, it will be error after verdict. *Lee v. Clarke*, 2 *East's R.* 333. In proceedings on the stat. 5 Ann. c. 14. it is to be observed, that that statute alone creates the offence and gives the penalty. This statute was originally a temporary law, but before it expired, it was made perpetual (by stat. 9 Ann. c. 25.) Consequently, in such case, the allegation that the defendant committed the offence contrary to the form of the statute is proper. Adjudged on motion in arrest of judgment, *E. of Clanricarde v. Stokes*, 7 *East*, 516.

(14) Formerly, I believe, it was usual to say, "whereby and by force of the statutes;" but, in the case of *E. of Clanricarde v. Stokes*, 7 *East*, 516. the court were of opinion, that upon a supposition that it was necessary that the count should refer to the statute giving the remedy, for which it was admitted no express authority could be found, yet they thought, that in the case before the court, the stat. 2 G. 3. c. 19. *alone* gave the remedy, without reference either to the stat. 8 G. 1. or the stat. 26 G. 2. inasmuch as it gave the whole penalty to the informer, and not merely the other half in addition to the one half given by the stat. 8 G. 1. and consequently, that the declaration, concluding by reason whereby, and by force of the statute, was correct.

stances under which possession of game shall not be deemed an offence against this statute.

A joint action may be maintained against several defendants, *e. g.* for keeping a lurcher to kill and destroy the game, and although the jury find a verdict for the plaintiff as to some of the defendants only, the plaintiff will be entitled to recover the penalty; for the action is founded on a tort, and not on a contract.

Evidence.

The plaintiff must prove that the defendant committed the act constituting the offence, and that the action was brought within the limited time^b. It is not necessary for the plaintiff to give negative evidence of the want of the qualification in the defendant^c; for the proof of the fact having been committed by the defendant is sufficient to throw the *onus* upon him, of proving that he was qualified to do it.

In *convictions* on the game laws, a different rule holds, and some, though slight, evidence of the want of qualification is required^d to be given by the prosecutor; but the better opinion seems to be, that the prosecutor ought not to be required to give such evidence; however, in *R. v. Stone*, 1 East, 639. the Court of King's Bench were equally divided on this point, Kenyon C. J. and Grose J. being of opinion, that the prosecutor ought to give such evidence, Lawrence J. and Le Blanc J. *contra*.

During the period when part of the penalty was given to the poor of the parish^e, the name of the parish was matter of substance; but since the making the stat. 2 G. 3. c. 19. which gives the whole penalty to the informer, the name of the parish, stated in the declaration, is considered merely as a *venue*, and the plaintiff may prove the defendant guilty in any other parish within the county.

^a *Hardyman v. Whitaker*, 2 East, 573. ^d *Per Chambre J.* 1 Bos. & Pul. 307.

^b See ante p. 809. ^e *Clerk v. Taylor*, Hertford Sum. Ass. 1809. per Kenyon C. J. 3 Esp. N. P. C. 218.

^c Adm. in *R. v. Stone*, 1 East, 639.

V. Of the Duties made payable in respect of killing Game.

By stat. 48 G. 3. c. 55. entitled (*inter alia*) an act for repealing the duties on game certificates, and granting new duties to be placed under the management of the commissioners of taxes, "Every person using any dog, gun, net, or other engine, for the purpose of taking or killing game, or any woodcock, snipe, quail, or landrail, or any conies in G. B.; if such person be a servant to a person charged in respect of such servant by this act, and shall use any dog, &c. for any of the before-mentioned purposes, upon a manor or royalty in England, Wales, or Berwick-on-Tweed, or Scotland, by virtue of a deputation or appointment duly registered or entered as gamekeeper, is charged with the annual sum of 1*l.* 1*s.*; and if not a servant for whom the duties on servants shall be charged, the annual sum of 3*l.* 3*s.*; and every other person using any dog, &c. for any of the purposes before-mentioned, is chargeable with the annual sum of 3*l.* 3*s.* with two exceptions only; 1. the taking woodcocks and snipes, with nets and springes; and 2. the taking or destroying conies in warrens, or in any enclosed ground, or by any person in land in his occupation, either by himself or by his direction." These duties are to be paid to the collector of assessed taxes, for the place where party resides; and the collector is authorized to give a receipt, and to demand 1*s.* of the party for the same, over and above the duty, as a compensation for his trouble. The receipt being delivered to the clerk of the commissioners of the district, he will exchange it for a certificate, gratis. Gamekeepers, in whose behalf a receipt and certificate have been obtained by their masters, are not required to obtain a certificate for themselves; but it is provided that the certificate shall be void upon the revocation of the deputation, but the same may be renewed, for the remainder of the year, in behalf of the new gamekeeper. The same statute provides that unqualified persons shall not be protected by the certificate; and that the protection of gamekeeper's certificates shall not extend beyond the limits of the manor for which they are appointed. The following persons may demand the production of certificate, and permission to read or take a copy of it, viz. the assessor or collector of the parish where the party is using dog, &c.; commissioners of assessed taxes for the county, riding, division or place; lord, lady,

or gamekeeper of the manor; inspector of taxes for the district; any person duly assessed to these duties for killing game; and, lastly, the owner, landlord, lessee, or occupier of the land. If certificate is not produced, then the party who has made the demand, may require the person using the dog, gun, &c. under a penalty of 20*l.* to declare his christian and surname, and place of residence, and parish or place in which he has been assessed; lastly, persons who use dogs, guns, &c. without having obtained certificate, are to pay the duty of 3*l.* 3*s.* by way of surcharge, and a penalty of 20*l.*

CHAP. XXIV.

IMPRISONMENT.

- I. *Of the Nature of the Action for false Imprisonment, and in what Cases it may be maintained.*
- II. *Statutes relating to the Action of false Imprisonment, 21 Jac. 1. c. 12—24 G. 2. c. 44.*
- III. *Of the Pleadings.*

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- I. *Of the Nature of the Action for false Imprisonment, and in what Cases it may be maintained.*

FALSE imprisonment is a restraint on the liberty of the person without lawful cause; either by confinement in prison, stocks, house, &c. or even by forcibly detaining the party in the streets, against his will^a. For this injury an action of trespass *vi et armis* lies, usually termed an action for false imprisonment.

In Buller's *Nisi Prius*, 22, it is said, that every imprisonment includes a battery, and it appears that Kenyon C. J. was of this opinion in *Oxley v. Flower* and another, but this has been otherwise decided since, in *Emmett v. Lyne*, 1 Bos. & Pul. N. R. 255. and ante, p. 42. n.; the court observing, that it was absurd to contend that every imprisonment included a battery.

An unlawful detention is a new caption, and may be declared on as such^b.

An arrest on mesne process, which is not returned, is wrongful^c, and false imprisonment will lie against the sheriff^d; so if an officer of an inferior court does not return

^a Per Thorpe C. J. 22 Ass. 60. 104. ^c 2 Rol. Abr. 286. pl. 2.
pl. 85. ^d *Ib.* pl. 13.

^b 2201 Jac. 379.

the process directed to him, he is a trespasser *ab initio*, and false imprisonment lies against him; for he is as sheriff within the jurisdiction.

The sheriff must at his peril, execute the writ upon the person really named therein^a; and if he mistakes the person, he is liable to an action for false imprisonment.

A. B. brought false imprisonment against C. who justified that he had a warrant to arrest J. S. and having asked A. B. the plaintiff, what his name was, he answered J. S. whereupon C. arrested A. B. Plaintiff demurred, and judgment for plaintiff, because C., the defendant, ought at his peril to have taken notice of the person named in the writ.

A sheriff's officer^e having received a warrant to arrest A., whose person he had never seen, went to her house, where he found her and the plaintiff together. Addressing himself to the plaintiff, he said, "I have a writ against you;" upon which A. desired the plaintiff to go with the officer. The officer immediately took plaintiff to a sponging house, where he kept her all night; but the next morning, having discovered his mistake, he released her. Kenyon C. J. admitted the law to be as stated in the preceding case; but considering this as a trick on the officer, directed the jury to give the plaintiff nominal damages only, which they did accordingly.

If a magistrate's warrant be shewn by the constable^b, who has the execution of it, to the person charged with an offence, and he thereupon *voluntarily and without any, even the slightest, compulsion*, attends the constable to the magistrate, who after examination dismisses him; it seems that this will not constitute an arrest, so as to enable the party to maintain trespass for an assault and false imprisonment (1).

An action for false imprisonment was brought by a native and inhabitant of Minorca^c, (then part of the dominions of

^a Per Hankford J. 11 H. 4. 91. a. See also Thurbane and another, Hardr. 393. per Hale C. B.

^f Moor, 457. Hardr. 393. S. P.

^g Oxley v. Flower, B. R. Middx. Sittings, Dec. 4, 1800. MSS.

^b Arrowsmith v. Le Mesurier, 2 Bos. & Pull. N. R. 211.

ⁱ Mostyn v. Fabrigas, in error, M. T. 15 G. 3. B. R. Cowp. 161. (2).

(1) Words merely will not make an arrest. *Gerner v. Sparks*, Salk. 79.

(2) The proceedings in all the stages of the cause will be found reported at great length in the eleventh volume of the State Trials, p. 162. edited by Mr. Hargrave.

the crown of Great Britain) against the governor of the island, for imprisoning the plaintiff at Minorca, and causing him to be carried thence to Carthagen in Spain. The plaintiff laid the venue in London, stating the injury to have been committed at Minorca, to wit, at London in the parish of St. Mary-le-Bow, &c. The defendant justified, on the ground that the plaintiff had endeavoured to create a mutiny among the inhabitants of Minorca, whereupon the defendant, as governor, was obliged to seize the plaintiff, and imprison him, &c. The plaintiff replied *de injuriâ sua propria*. After verdict for plaintiff, with 3000*l.* damages, a bill of exceptions was tendered, and error having been assigned thereon, it was contended, (among other things) 1st, That the plaintiff, being a Minorquin, was incapacitated from bringing an action in the king's courts in England: but it was holden, that a subject born in Minorca was as much entitled to appeal to the king's courts as a subject born in Great Britain; and that the objection of its not being stated on the record, that the plaintiff was born since the treaty of Utrecht, did not make any difference. 2dly, It was objected, that the injury having been done at Minorca, out of the realm, could not be tried in the king's courts in England; but it was holden, that an action for false imprisonment being a transitory action, it was competent to the plaintiff to lay it in any county of England, although the matter arose beyond the seas.

If a person causes another to be impressed, he does it at his own peril, and is liable in damages, if that person can shew that he was not subject to the impress service.

The defendant went to the place of rendezvous^k for the impress service, near the tower, and gave information that there was a young man (meaning the plaintiff) at a house she described, who was liable to be impressed, and who was a fit person to serve his Majesty. In consequence of this, the plaintiff was seized by the press-gang, and carried on board the tender, where he was detained, until it was discovered that he had never been in a ship before, except once, when he had been in like manner wrongfully impressed. An action for trespass and false imprisonment having been brought, it was objected that the form of action should have been an action on the case, and not an action of trespass; but *Ld. Ellenborough C. J.* was of a different opinion, observing, that this was not like a malicious prosecution, where a party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a trespass here

^k *Flewster v. Royle*, 1 Camp. N. P. C. 187. *Ld. Ellenborough C. J.*

in seizing the plaintiff, and the defendant therefore, was a trespasser in procuring it to be done.

An action will not lie at common law for false imprisonment¹, where the imprisonment was merely in consequence of taking a ship as prize, although the ship has been acquitted.

Trespass for false imprisonment will lie against overseers of the poor for imprisoning a man under a justice's warrant², until he should pay a sum of money for the maintenance of a child which should be born of a woman then pregnant by plaintiff, but who had not been as yet delivered.

If A., having been robbed³, suspect B. to be guilty of the robbery, and take B., and deliver him into the charge of a constable present, B. (if innocent) may maintain trespass and false imprisonment against A.

If a prisoner in execution escape by the voluntary permission of the gaoler, and the gaoler retake him, he is liable to an action of false imprisonment⁴. But an officer who has arrested a prisoner on *mesme process*, and voluntarily permitted him to escape, may retake him *before* the return of the writ, without being liable to such action.

Trespass for false imprisonment will lie, for a detention under a lawful process, if it be executed at an unlawful time, as on a Sunday⁵; for by stat. 29 Car. 2. c. 7. s. 6. it is provided, "That no person upon the Lord's day shall serve, or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace) (3); but that the service of every such writ, &c. shall be void; and the person or persons so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, process, &c."

¹ *Le Caux v. Eden*, Doug. 594. ⁿ *Stonehouse v. Elliott*, 6 Tl R. 315.
^m *Wenman v. Fisher*, M. 2 G. 2. B. R. ^o *Atkinson v. Matteson*, 8 Tl R. 172.
^{MSS.} cited in *R. v. Banghurst*, H. 5 ^p *Wilson v. Tucker*, Selk. 78., 5 Mod.
G. 2. B. R. Sess. Ca. vol. 1. p. 149. 95. S. C.

(3) In *Taylor v. Freeman* and another, Glouc. Lent Ass. 1757; MSS. it appeared, that the defendants, as constables, had arrested the plaintiff upon a Sunday, by virtue of a warrant from a justice of the peace, for getting a bastard child. An action for false imprisonment having been brought, Adams, Baron, held, that plaintiff was entitled to recover.

Trespass for false imprisonment may be maintained against the sheriff for an arrest made by his bailiff after the return day of the writ.

So against commissioners of bankrupts, who commit a person suspected to detain effects of the bankrupt for not attending on the first summons; for the statute directs, 1st, a summons to the party (4); 2dly, on his default or neglect, a warrant to bring him before the commissioners in custody in order to be examined (5), or else a second summons, at their discretion; 3dly, if when brought in custody he refuses to be examined, or upon a second summons refuses to come (6), then, and not before, the commissioners have power to commit.

When a court has jurisdiction of the cause, and proceeds *inpero ordine*, or erroneously, an action does not lie against the party who sues, or the officer or minister of the court who executes the precept or process of the court; but when the court has not jurisdiction of the cause, the whole pro-

q Parrot v. Mumford, 2 Esp. N. P. C. s 1 Jac. 1. c. 15. s. 10.

586. Prior C. J.

r Battye v. Gresley, 8 East, 319.

t Second resolution, Marshalsea case,

10 Rep. 76 a.

(4) It is not necessary, upon the summons, to tender the witness the expenses of his journey beforehand; though if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons; it lies, however, on the party so summoned having a lawful excuse for not attending, to prove the fact, in an action of trespass and false imprisonment brought by him for such arrest. Battye v. Gresley, 8 East, 319.

(5) The warrant for the arrest of the witness, in order to examine him, may issue after his disobedience to the first summons. The propriety of granting the warrant of commitment being an act of discretion, must be determined upon by the commissioners acting together at the time; and their order to their officer, to make out such warrant, must be taken to include their direction as to the persons to whom it is to be directed; but the mere act of signing the names of the commissioners to the warrant, may be done by them separately. 8. C.

(6) The general practice has been to issue a second summons upon the neglect of the first, before the warrant of commitment; but the act does not require a second summons. It is in the disjunctive. The first branch is complete, and the next may well be taken to mean, that if a party, after having once before been summoned, and appearing, or having lawful impediment for not appearing, be summoned again, and do not appear, &c. having no lawful impediment, he may be committed, as well as if he neglect to appear on the first summons, having no lawful impediment. Per curiam, in Battye v. Gresley, 8 East, 326.

ceeding being ~~contra non judice~~, an action will lie against them, without any regard to the precept or process (7).

Hence, where one of the bail had been arrested by process out of the Marshalsea, for the purpose of satisfying a judgment obtained against the principal in a cause, of which the Marshalsea court had not jurisdiction, it was held, that an action for false imprisonment would lie against the party who sued, the marshal who directed the execution of the process, and the officer who executed the same.

If a justice of the peace make a warrant to a constable to bring A. B. before him, for a matter of which he has a general cognisance, though the J. P. had no foundation in fact for granting such a warrant, or though the warrant itself be defective in point of form, yet the constable may justify under it; but if the J. P. make a warrant to take up A. B. to answer in a plea of debt, a constable cannot justify under such a warrant, because the justice has not any jurisdiction of debts.

II. Statutes relating to the Action of false Imprisonment, 21 Jac. 1. c. 12.—24 G. 2. c. 44.

Stat. 21 Jac. 1. c. 12.—By stat. 21 Jac. 1. c. 12. s. 5. it is enacted, "if any action, bill, plaint, or suit, for false imprisonment, shall be brought against any J. P., mayor, or bailiff of city, or town corporate, headborough, portreve, constable, tithing-man, churchwarden, or overseer of the poor, and their deputies, or any other, (who in their aid, or by their commandment, shall do any thing concerning their office) concerning any thing by them done by virtue of their office, such action, bill, &c. shall be laid within the county where the trespass was committed." 2. "The above-mentioned persons may plead the general issue, and give the special matter in evidence." 3. "If upon the trial, the

a Marshalsea case, 10 Rep. 68. b. x Shergold v. Holloway, Str. 1002.

(7) This principle has been recognised in several cases. See *Nichols v. Walker*, Cro. Car. 395. *Hill v. Bateman*, Str. 711. *Shergold v. Holloway*, Str. 1002. *Perkin v. Proctor*, 2 Wils. 384, and recently in *Brown v. Compton*, 8 T. R. 424.

plaintiff shall not prove that the trespass was committed within the county wherein the action, &c. is laid, then the jury shall find the defendant, without respect to the plaintiff's evidence, *not guilty*." 4. "If the verdict shall pass with defendant, or plaintiff become nonsuit, or suffer any discontinuance, defendant shall have double costs."

N. The officer or person acting in aid, in order to entitle himself to double costs, must obtain a certificate from the judge, that, at the time of the trespass, he was a mayor, constable, &c. and in the execution of his office, or that he was acting in aid of mayor, constable, &c.⁷ But it is not necessary that it should be granted at the trial⁸.

The provisions of the preceding statute having been found very salutary, they have, by a late statute (42 G. 3. c. 85. s. 6.), been extended to all persons holding a public employment, or any office, station, or capacity, civil or military, either in or out of this kingdom, and who, by virtue of such employment, have power to commit persons to safe custody; provided, that where any action shall be brought against such persons in this kingdom, for any thing done out of this kingdom, the plaintiff may lay the act to have been done in Westminster, or in any county where the defendant shall reside.

By stat. 24 G. 3. c. 44. s. 1. "No writ shall be sued out against, nor any copy of any process at the suit of a subject, shall be served on, any J. P., for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue, at least one calendar month before the suing out or serving the same, in which notice shall be clearly and explicitly contained the cause of action (8); on the back of

⁷ Anon. 2 Vent. 46.

⁸ *Harper v. Carr*, 7 T. R. 449.

(8) Two things are required by this clause before an action can be brought against a magistrate, one that the plaintiff shall give notice of the writ or process which he intends to sue out; the other, that such notice shall also contain the cause of action. This form prescribed by the statute must be religiously adhered to, as will appear by the following case:

Plaintiff gave defendant notice, which, after reciting the cause of complaint, stated, that plaintiff would cause an action to be commenced against defendant; such notice was held insufficient, because it did not mention any writ or process. *Lovlace v. Curry*,

which notice shall be endorsed the name of such attorney, with the place of his abode (9) who shall be entitled to the fee of 90s. for preparing and serving such notice." And by s. 2. "It shall be lawful for such J. P., at any time within one calendar month after such notice given, to tender amends to the party complaining, or to his attorney, and in case the same is not accepted, to plead such tender in bar to any action grounded on such writ or process, together with the plea of not guilty, and any other plea, with leave of the court; and if upon issue joined the jury find the amends so tendered to have been sufficient, they shall give a verdict for the defendant; and in such case, or in case the plaintiff become nonsuit, or discontinue his action, or judgment be given for such defendant upon demurrer, such J. P. shall be entitled to the like costs as if he had pleaded the general issue only; and if the jury find that no amends were

7 T. R. 631.—It is not necessary, however, that the *form of action* should be stated in the notice*; but the plaintiff having given notice of one form of action cannot declare in another:

Plaintiff gave notice of an action on the note for false imprisonment, and afterwards brought an action of trespass and false imprisonment. Yates J. held the notice insufficient, as tending to mislead the J. P. who might know that an action on the case was improper, and such whereon the plaintiff might be nonsuited, and neglect to tender amends. *Strickland v. Ward*, Winchester Sum. Ass. 1767, reported in a note to *Lovelace v. Curry*, 7 T. R. 631.

Where the subject matter is within the jurisdiction of the magistrate, and he intends to act as a magistrate at the time, however mistaken he may be, he is still within the protection of the statute. Hence, where one magistrate committed the mother of a bastard to custody for not filiating, it was holden that such magistrate was entitled to the notice prescribed by this statute, before an action for false imprisonment was brought against him, although the stat. 18 Eliz. c. 3. s. 2. only gives jurisdiction in such matters to two justices of the peace. *Weller v. Toke*, 9 East, 364.

(9) A notice written by the attorney, and signed by him thus: "Given under my hand, at Durham," was holden insufficient, because it did not expressly state that Durham was the place of attorney's residence. *Taylor v. Fenwick*, M. 23 Geo. 3. B. R. cited by Lawrence J. in *Lovelace v. Curry*, 7 T. R. 635. But a notice, endorsed with the name of the plaintiff's attorney, with the addition of the words "of Birmingham," has been holden sufficiently descriptive of the attorney's place of residence. *Osborn v. Gough*, 3 Bos. & Pul. 551.

* *Sabin v. De Rugh*, 2 Camp. N. P. C. 106.

tendered, or that the same were not sufficient, and also against the defendant on such other plea, they shall give a verdict for the plaintiff, and such damages as they think proper, which he shall recover, together with his costs." And by s. 3. "No such plaintiff shall recover any verdict against such J. P. where the action is grounded on any act of the defendant, as J. P., unless it is proved upon the trial that such notice was given; but in default thereof, such J. P. shall recover a verdict and costs." And by s. 4. "In case such J. P. neglect to tender any amends, or have tendered insufficient amends before the action brought, he may, by leave of the court where such action depends, at any time before issue joined, pay into court such sum as he shall see fit; whereupon such proceedings shall be had as in other actions where the defendant is allowed to pay money into court." And by s. 5. "No evidence shall be given by the plaintiff, on the trial of any such action, of any cause of action, except such as is contained in the notice." And by s. 6. "No action (10) shall be brought against any

(10) This section does not extend to actions of assumpsit. Hence, where an action for money had and received was brought against an officer, who had levied money on a conviction by a J. P., the conviction having been quashed, it was holden, that a demand of the copy of the warrant was not necessary. *Feltham v. Terry*, E. 13 G. 3. B. R.. Whether the term "action" extended to replevin or not, seems formerly to have been a *veraxa questio*. In *Pearson v. Roberts* and another, Willes, 668. it was holden to extend to actions of replevin to recover damages†: but Willes C. J. in delivering the opinion of the court, took a distinction between a replevin by plaint, in the sheriff's court, for the recovery of the goods, and replevin by way of action, to recover damages, admitting that the former could not be considered as an action within the meaning of the statute. In *Milward v. Caffin*, 2 Bl. R. 1330. it was holden, that replevin was a proceeding, to which the statute had never been held to extend. On the last cited case, Lord Kenyon made the following observations, in *Harper v. Carr*, 7 T. R. 270. "I will not now enter into an examination of the case of *Milward v. Caffin*, because that was decided on the form of the action, *replevin*, to which it was ruled this statute did not extend; had it not been for that decision, I should have thought that the act *did* extend to a replevin, and certainly convenience requires that it should; otherwise it is in the plaintiff's power to evade the provisions of the act, by adopting a particular mode of proceeding,

* Bull. N. P. 24.

† Q. Whether there be any mode of proceeding, by action of replevin, to recover damages, as contradistinguished from proceedings to have the goods again. See 6 East, 266.

constable, headborough, or other officer (11), or against any person acting by his order and in his aid, for any thing done in obedience (12) to any warrant under the hand or seal of any J. P. until demand has been made or left at the usual place of his abode, by the party intending to bring such action, or by his attorney, in writing (13), signed by the party (14) demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for six days after such demand; and in case, after such demand and compliance therewith, any action be brought against such constable, &c. for any such cause as aforesaid, without making the J. P. who signed or sealed the said warrant, defendant, on producing and proving such warrant at

which depends on his own choice. Perhaps, however, it may be shown on examination, that this case was rightly decided, whatever doubts may have been concerning it." Such was the opinion of Lord Kenyon; but the question to which it relates is now completely at rest: for, in *Fletcher v. Wilkins*, 6 East, 293. it was expressly determined, that replevin was not an action within the meaning of this statute; Lord Ellenborough C. J. (who delivered the judgment of the court) observing, that the reason assigned by Lord Kenyon, *ab inconvenienti*, had undoubtedly great weight; but, on the other hand, it appeared to the court, that the inconvenience of depriving the subject of his remedy by replevin was full as great; for it might happen, that no damages which a jury was properly authorized to give, could compensate for the loss of a particular chattel, which the owner might be for ever deprived of, if he could not sue replevin.

(11) Churchwardens*, and overseers of the poor†, acting under a magistrate's warrant of distress for a poor's rate, are within the meaning of the words "other officer" in this statute, and consequently entitled to the protection which it affords, when sued in those actions to which the statute extends, *e. g.* trespass, &c., but *secus* when sued in replevin, that being a proceeding not within the statute. See the preceding note.

(12) The officer must prove that he acted in obedience to the warrant, and where the J. P. cannot be liable, the officer is not entitled to the protection of the statute. *Money v. Leach*, 3 Burr. 1766.

(13) A duplicate original of demand is sufficient evidence. *Jory v. Orchard*, 2 Bos. & Pul. 39.

(14) Demand, signed by attorney, is within the meaning of this section. *Ib.* per Buller J.

* *Harper v. Carr*, 7 T. R. 371.

† *Nutting v. Jackson*, E. 3 G. 3. B. R. Bull. N. P. 24.

the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such J. P.; and if such action be brought jointly against such J. P. and such constable, &c. then, on proof of such warrant, the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction; and if the verdict be given against the J. P., the plaintiff shall recover his costs against him, to be taxed in such manner as to include the costs which the plaintiff is liable to pay to the defendant for whom such verdict is found as aforesaid."

S. 7.—"Where plaintiff in any such action against any J. P. obtains a verdict, he shall be entitled to double costs, if the judge (before whom the cause is tried) in open court will certify, on the back of the record, that the injury for which such action was brought was wilfully and maliciously committed."

S. 8.—"No action shall be brought against any J. P. for any thing done in the execution of his office, or against any constable, &c. acting as aforesaid, (15) unless commenced within six calendar months after the act committed (16)."

For the further protection of magistrates it is enacted, by stat. 43 G. 3. c. 141. that in all actions brought against any J. P., on account of any conviction made, by virtue of any act of parliament, or by reason of any thing done, or commanded to be done, by such J. P., for the levying of any penalty, apprehending any party, or for or about the carrying such conviction into effect, *in case such conviction shall have been quashed*, the plaintiff, in such action, (besides the value and amount of the penalty, which may have been levied upon the plaintiff, in case any levy thereof shall have been made,) shall not be entitled to recover any more or greater damages than the sum of two-pence, nor any costs

(15) "Acting as aforesaid," that is, under the warrant of a magistrate. If, therefore, a constable acts without a warrant, this statute does not apply, and the action against such constable may be brought after the expiration of six calendar months, and at any time within the period allowed by the statute of limitations, 21 Jac. 1. c. 16. *Postlethwaite v. Gibson*, Middx. sittings after M. T. 41 G. 3. *Kenyon C. J. MSS.* and 3 Esp. 226. S. C.

(16) If a man be imprisoned by a warrant of J. P. on the 1st day of January, and kept in prison till the 1st day of February, he may bring his action within six months after the 1st of February, for the whole is one entire trespass. *Pickersgill v. Palmer*, Bull. N. P. 24.

of suit, unless it shall be expressly alleged in the declaration in the action wherein the recovery shall be had, *and which shall be in an action upon the case only*, that such acts were done maliciously, and without any reasonable and probable cause. *Sect. 2.*—And further, that such plaintiff shall not be entitled to recover against such justice any penalty which shall have been levied, nor any damages or costs, in case such justice shall prove at the trial, that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law for such offence.

This statute applies to those cases only where there has been a conviction.^a

III. *Of the Pleadings.*

THE general issue to an action for false imprisonment is, not guilty.

By stat. 7 Jac. 1. c. 5. (made perpetual by 21 Jac. 1. c. 12.) in an action upon the case, trespass, battery, or false imprisonment, against a J. P., mayor, bailiff, constable, &c. for any thing done by virtue of their offices, or against any other persons acting in their aid, and by their command, concerning their offices, the defendant may plead the general issue, and give the special matter in evidence.

In other cases, matter of justification must be pleaded specially. Every plea of justification must admit the trespass.

To an action for false imprisonment brought by A. against B., C. and D.^b, they pleaded a plea of justification, under process, wherein B. said, that he, as attorney for the plaintiff in the original action, delivered the warrant made by the sheriff upon the process to C. and D. as his bailiffs, to be executed in due form of law, and that C. and D. thereupon arrested the plaintiff A., and detained him in prison. This was holden to be a sufficient admission by B. of the trespass, for the purpose of his justification, for he who commands or directs another to do a trespass is guilty

^a *Massey v. Johnson*, B. R. Trin. 49 G. 3. 12 East, 67. ^b *Rowe v. Tutte*, Willes, 14.

of the trespass, if done by the other person pursuant to his direction.

To trespass for false imprisonment, the defendant may plead that he did it by lawful authority.

It is a general rule of pleading, that where a party justifies a trespass under an authority given, he must shew that authority^c. There is a difference, however, in this respect, where the justification is under judicial process, between the party to the cause, or a mere stranger, and the officer who executes the process of the court. The party to the cause, or mere stranger, must set forth in their plea the judgment^d, as well as the writ; but the officer need only shew the writ^e (17) under which he acted, for he is bound to execute the process of the court, having competent jurisdiction, without enquiring after the judgment. And it is to be observed, that where the party to the cause and the officer join in pleading, the plea must contain all the requisites which would be necessary in case they had pleaded separately^f; for it is a general rule, that where two or more join in a defence, although the justification may be sufficient for one or more, yet if it be not sufficient for the rest it will be bad as to all the defendants. Such are the rules of pleading, where the justi-

c 1 Inst. 283. a. *Matthews v. Cary*, 1 Lev. 98. *Cotte v. Michill*, 3 Lev. 80.
 d Per Holt C. J. *Burton v. Cole*, Carth. 443.
 e *Turner v. Felgate*, 1 Lev. 98. *Cotte v. Michill*, 3 Lev. 80.
 f *Phillips v. Biron*, Str. 509. *Smith v. Boucher*, Str. 994. *Middleton v. Price*, Str. 1184.

(17) Where final process issues, a return is not necessary (*Hoe's case*, 5 Rep. 90.); consequently it is not necessary to allege that such process was returned. (*Rowland v. Veale*, Cowp. 18. recognised in *Cheasley v. Barnes*, 10 East, 73. but there said by Ld. Ellenborough C. J. that if any ulterior process in execution is to be resorted to, to complete the justification, there it may be necessary to shew to the court the return of the prior writ, in order to warrant the issuing of the other.) But an officer who justifies under process, which he ought to return (and all mesne process ought to be returned) must shew that such process was returned. *Middleton v. Price*, Str. 1184. "There is a difference, however, between the principal officer, to whom the writ is directed, and a subordinate officer; the former shall not justify under the process, unless he has obeyed the order of the court in returning it; otherwise it is of one who has not the power to procure a return to be made." Per Holt C. J. in *Freeman v. Blewett*, Ld. Raym. 633, 634.

fication is founded on process out of the superior courts: but in justifying under process issuing out of inferior courts, a greater strictness is required: as, 1. The nature and extent of the jurisdiction of the court below ought to be set forth (18); for the judges of the superior courts are not bound to take cognizance of it. N. This rule holds even in justifications by officers. 2. It ought to be stated, that the cause of action below arose within the jurisdiction of the court below; on this point, indeed, there has been a diversity of opinion; for in *Gwynne v. Poole* and others, *Lutw.* 935. it was holden, that a justification by the party, judge, and officer, to whom the process was directed, was good, although it did not state that the cause of action below arose within the jurisdiction of the court below; but in *Moravia v. Sloper* and others, *Willes*, 30. (where *Willes C. J.* controverts with great ability the reasoning of *Powell J.* in *Gwynne v. Poole*) the propriety of this decision was questioned, and it was ruled, that although it might not be necessary for the officers (19) of the court below to make this averment in their plea, because they were punishable if they did not obey the process of the court, yet when the party, or his attorney, or a mere stranger, pleaded a justification under process of an inferior court of record, it was necessary for them to state, that the cause of action arose within the jurisdiction of the court (20). Merely stating in the plea the declaration in the court below, which contained an averment that the cause of action arose within the jurisdiction, is not

g *Moravia v. Sloper*, *Willes*, 37.

(18) It is not necessary, however, to make a profert of the letters patent by which the court is erected. *Titely v. Foxall*, *Willes*, 689.

(19) But see *Morse v. James*, *Willes*, 128. where it was holden, that though an officer need not set forth the proceedings at length, and though he may justify under an erroneous process, yet it must appear that the process issued in a cause wherein the court below had jurisdiction.

(20) But it is not necessary to set forth the cause of action, *Rowland v. Veale*, *Cowp.* 18. recognised in *Belk v. Broadbent*, 3 T. R. 183. where the same doctrine was applied to a justification under meane process issuing out of a superior court, and in which the defendant merely stated, that the writ, upon which the plaintiff had been arrested, had been issued upon an affidavit to hold to bail, without stating any cause of action for which the plaintiff was liable to be arrested.

sufficient, for such averment is not traversable^h. 3. Before the time of Charles the Second, it was necessary to set forth the proceedings had in the inferior court at length (21); but now they may be set out shortly with a *taliter processum est*ⁱ; but if the party justify under a *capias ad respondendum*, a precedent summons ought to be set forth^k, or at least the plea ought to be so framed, that the court may intend that a precedent summons had issued^l, for a *capias* without a summons is illegal. Where it is stated that the *capias* issued at the same court at which the plaint was levied, this intendment cannot be made^m; but where it appears on the plea that the plaint was levied at one court, and the *capias* issued at a subsequent court, and this allegation is introduced by a *taliter processum est*, there such intendment may be madeⁿ.

In justifying a trespass under the process of a foreign court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior courts; but, at any rate, a plea which only states that the court abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal

^h Adney v. Vernon, 3 Lev. 243.

ⁱ Patrick v. Johnson, 3 Lev. 403. Rowland v. Veale, Cowp. 18. Higginson v. Martin, 2 Mod. 197.

^k Marpole v. Basnet, Willes, 38. n. (a.)

^l See Titley v. Foxall, Willes, 688.

^m Marpole v. Basnett, ubi sup. Murphy v. Fitzgerald, Willes, 38. n. (a.)

ⁿ Titley v. Foxall, Willes, 688. Adams v. Freeman, reported in Say. 81. and 2 Wils. 5. and illustrated by Durnford, Willes, 39.

(21) There is an *obiter dictum* in Morse v. James, Willes, 128. that the plaintiff, or a mere stranger, must set forth the proceedings at length, and it is there said to have been established in Moravia v. Sloper. Upon an examination of that case, I cannot find that any such point was expressly decided in it. The court, indeed, in that case were of opinion, that the party, having set forth a *capias*, ought to have shewn a precedent summons, and that from the *taliter processum est*, as there pleaded, a summons could not be presumed. It is worthy of remark, that Willes C. J., speaking of Moravia v. Sloper, in Titley v. Foxall*, says, "we held, in Moravia v. Sloper, that *taliter processum est* would be sufficient, if it did not appear (as it did in that case) that there could not have been a precedent summons. So in Johnson v. Warner, Willes, 528. it was holden that this mode of pleading, by *taliter processum est*, was good, and the modern practice is in conformity with it. Rowland v. Veale, Cowp. 18. and 1 Wms. Saund. 92. n. (2)."

* Willes, 690.

proceedings were had, according to such foreign laws, against the property in question, in such court having competent jurisdiction in that behalf, *et taliter processum*, &c. that the defendant was ordered, by the said court having competent authority in that behalf, to seize the property, is bad, as being too general, and not giving the plaintiff notice, whether the defendant justified as an officer of the court, or party to the cause, or of what nature the charge was, or by whom instituted, or what the order of seizure was, whether absolute or *quousque*, &c.^o

Regularly, process ought to describe the party against whom it is meant to be issued, and the arrest of one person cannot be justified under a writ sued out against another.

To trespass for false imprisonment^o by A. B. the defendant pleaded, that J. S. sued out a writ of latitat *against the plaintiff*, A. B., *therein called by the name of* C. B., directed to the sheriff of L., and then set forth the writ authorizing the sheriff to arrest C. B. &c., who directed his warrant to the defendant, and thereby commanded him to take *the said A. B. therein called by the name of* C. B. &c., concluding with an averment, that the said A. B. and C. B., in the said writ and warrant mentioned, are *one and the same person*. On general demurrer, the plea was holden to be bad, Lord Ellenborough C. J. observing, that this case was exactly the same in principle as *Cole v. Hindson*, 6 T. R. 234: (22). And Lawrence J. said, in *Cole v. Hindson*, Lord Kenyon observed, that there was not any averment that the plaintiff was known as well by the one name as the other; neither was there any such averment in this case.

A beadle of a ward, in the city of London, is justified in detaining in prison for examination, persons walking in the

o Collett v. Ld. Keith, 2 East, 260. p Shadgett v. Clipson, 8 East, 328.

(22) In that case to trespass for taking the goods of A. B. the defendant (an officer) pleaded that he took them under a distress against C. B., meaning the said A. B., to compel an appearance, averring that A. B. and C. B. were the same person. N. A. B. had not appeared in the original action. On demurrer, the plea was holden to be bad; Lord Kenyon C. J. observing, that this was distinguishable from *Crawford v. Satchwell*, Str. 1218. where it was determined, that the defendant might be taken in execution by virtue of a *ca. sa.* under a wrong name; for there the party had appeared in the original action, and done an act to avow that he was sued by the right name.

See the report of this case in Shonke by which it does not appear the party had app.^r and in fact the question could scarcely have been raised if the party had appeared as he would have been stopped for his own act and a

streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed^r. So a peace-officer may justify an arrest in the day-time on a reasonable charge of felony without a warrant, although it should afterwards appear, that a felony had not been committed^s. But when a *private person* apprehends another on suspicion of felony, he does it at his peril, and is liable to an action, unless he can establish in proof that the party has actually been guilty of a felony^t. Proof of mere suspicion will not bar the action, although it may be given in evidence in mitigation of damages^u.

It is lawful for a private person to do any thing to prevent the perpetration of a felony. Hence the imprisonment of a husband by a private person, to prevent him committing murder on his wife, is justifiable^v. So if two persons are fighting, and there is reason to fear, that one of them will be killed by the other, it is lawful to part them and imprison them, until their anger is cooled^w.

In general where an affray takes place in the presence of a constable^x, he may keep the parties in custody until the affray is over, or he may carry them *immediately* before a magistrate.

If a plea of justification consist of two facts^y, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification if one of these facts be found by the jury. Hence, where to an action for false imprisonment against a sheriff, he pleaded, that, at the time when the trespass was committed, the defendant was sheriff of the county of S., and in that character was presiding at the election of knights of the shire, to serve for the county in parliament; and because the plaintiff assaulted the defendant, and made a great noise and disturbance, and obstructed the defendant in the execution of his duty, he ordered a constable to take the plaintiff into custody and carry him before a J. P.; and the jury found that the plaintiff, who was a freeholder, did not assault the defendant, but that all the other facts contained in the plea were proved: it was holden, that that part of the plea,

^q *Lawrence v. Hedger*, 3 Taunt. 14.

^r *Samuel v. Payne*, Doug. 358. See also Cald. 291. and 2 Esp. N. P. C. 540.

^s *Adams v. Moore*, C. B. Middlesex Sittings after H. T. 51 G. 3. coram Heath J. MS.

^t S. C.

^u *Handcock v. Baker*, 2 Bos. & Pul. 260.

^x 2 Roll's Abr. 559. (E) pl. 3.

^y *Churchill v. Matthews, Nutt, & Hill*, Somerset Summ. Ass. 1808, Bayley J.

^z *Spilsbury v. Micklethwaite*, 1 Taunt. ton's R. 146.

which the jury had found, constituted a good defence; for although the sheriff had not any authority to commit, yet it was his duty to preserve order and decency in the county court.

In an action for false imprisonment, if the defendant can take advantage of the statute of limitations, he must plead that he was not guilty within four years.

If an action be brought for detaining plaintiff in prison from ~~-----~~ to ~~-----~~, and defendant plead (as he may) as to part, *not guilty within four years*, plaintiff may reply, that it was one continued imprisonment, and so oust the defendant of the benefit of the statute.

Where a declaration for false imprisonment against A. and B. contained two counts^b, to both of which the defendants pleaded *not guilty*, and justified the first under *mesne process*, A. as the plaintiff in that action, and B. as the bailiff, and the plaintiff, by a new assignment, admitting the arrest to be lawful, replied that B., with the consent of A., voluntarily released him, and that they afterwards imprisoned him for the time mentioned in the first count; the plaintiff having failed in proving the new assignment, by not shewing the consent of A.; it was holden that he should not be permitted to prove the same trespass against B. under the other count.

The plaintiff declared for an assault, battery, and imprisonment, and having proved a trifling imprisonment^c, but not any battery, obtained a verdict, with one farthing damages. Sir James Mansfield C. J. certified under stat. 43 Eliz. c. 6. An application was made to the court, that the plaintiff might have full costs, notwithstanding the certificate, on the ground that every imprisonment included a battery, and consequently, that this case fell within the exception mentioned in the statute; but the court were clearly of opinion, that the plaintiff was deprived of his costs by the certificate; observing, that it was absurd to contend that every imprisonment included a battery. It may be remarked, that Kenyon C. J. had ruled otherwise in *Oxley v. Flower* and another, B. R. Middlesex Sittings, December 4th, 1800, MSS. In an action for false imprisonment, the jury, by the direction of the C. J., found a verdict for the plaintiff with 1s. damages. Erskine, for the defendant, requested the C. J., to certify; but he refused, on the ground taken by the counsel for the plaintiff in the pre-

^a *Coventry v. Apsley*, Salk. 420.

^b *Atkinson v. Matteson*, 2 T. R. 172.

^c *Emmett v. Lyne*, 1 Bos. & Pul. N. R. 255.

ceding case, that every imprisonment included a battery, and consequently that this case fell within the exception mentioned in the statute.

It might be inferred from the preceding case of *Emmett v. Lyne*, that, if a battery were proved, the judge could not certify; but it has been solemnly decided, in *Wiffin v. Kincard*, 2 New R. 471. that whether there be a proof of a battery or not, still the judge may certify, with respect to the imprisonment, and thereby deprive the plaintiff of his costs.

CHAP. XXV.

INSURANCE.

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Implied	{	<ol style="list-style-type: none"> 1. <i>Not to deviate.</i> 2. <i>Seaworthiness.</i>
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X. *Evidence.*XI. *Return of Premium.*XII. *Of Bottomry and Respondentia.*XIII. *Insurance upon Lives.*XIV. *Insurance against Fire.*

I. *Of Insurance in general.*

INSURANCE is an agreement whereby one party, in consideration of a sum of money, either given or contracted for, undertakes to pay to the other party a certain sum of money upon the happening of some event. A *policy of insurance* is the instrument in which the terms of this agreement are set forth. To this instrument the insurer having subscribed his name, and, in the case of marine insurances, the sum which he undertakes to pay, in case the contingency happens, is termed the *insurer* or *underwriter*. The sum of money, received by the insurer as a consideration for his undertaking, is termed the *premium*, and the party protected by the insurance the *insured* or *assured*. The subject matter of insurance is as various as the different species of property, and the different kinds of danger to which they may be exposed. In some cases, however, a contract of insurance may be void, as being against the policy of the common law; in other cases, as being contrary to the express provisions of a statute (1). These are the only limits to the subject of insurance. The following sections will be confined to an investigation of three species of insurance only: 1. Marine insurance. 2. Insurance upon lives. 3. Insurance against losses by fire.

(1) The interference of the legislature has frequently been deemed necessary to provide against the mischiefs arising from insurances calculated merely to excite and encourage a spirit of gaming, and thereby to subvert the morals and impair the industrious habits of the people. See the stat. 9 Ann. c. 6. s. 57. whereby a penalty is imposed on persons setting up offices for making assurances on marriages, births, christenings, and service. See also stat. 27 G. 3. c. 1. against fraudulent insurances upon lottery tickets.

II. Of Marine Insurance—The Policy—Different Kinds—Requisites—Rule of Construction.

Of Marine Insurance.—MARINE insurances are made for the protection of persons having an interest in ships, or goods on board, from the loss or damage which may happen to them during a certain voyage, or a fixed period of time^a.

Insurance on ships and merchandize greatly conduces to the advancement of trade and navigation, and the extension of commerce, by dividing a risk which might be ruinous, and enabling parties to undertake larger adventures than it would otherwise be prudent for them to undertake.

The nature of this contract is a contract of indemnity^b, and this principle ought always to be kept in view in considering questions relative to insurance.

The Policy.—The policy of insurance, which has been defined to be the instrument in which the terms of the agreement are set forth, is generally printed, with a few terms superadded in writing, calculated either to control and confine, or to enlarge and extend, the printed language, and thereby to render it subservient to the intention of the parties in the particular contract. The form of the policy is at this day nearly the same as that anciently used among merchants (2); every policy still referring to those made in Lombard-street, where the Italians (who introduced them into England), used to meet at a house called the Pawn-house, or Lombard, for transacting business, before the building the Royal Exchange. The instrument is inaccurate and ungrammatical, but having acquired a sense from judicial decision and the usage (3) of trade, it may be safer to adhere to the

^a Marsh. c.

^b Goddall v. Boldero, B. R. M. 48 G.

3. 9 East, 81. recognised by Lord

Ellenborough in Bainbridge v. Nelson, 10 East, 344.

(2) See the form of policy of insurance used in London on ship or goods in the appendix to Mr. Park's valuable treatise. See the Scotch form, in Millar's Elements of the law relating to Insurances, 8vo. 1787. p. 30.

(3) How far the words of this written instrument ought to be controlled, or any words supplied from the usage of merchants, is a question which deserves great consideration, as it may affect a main principle in the law of evidence.

old form than to substitute another, though more correct. It is a simple contract, by which the heir is not bound, although the word "heirs" is erroneously used in the present form of the policy. The parties are bound by the contents of the instrument, and will not be permitted to give parol evidence contradicting³ or restraining⁴ the express terms thereof (4).

Different Kinds of Policies.—Policies are of four different kinds: 1. An interest policy. 2. A wager policy. 3. An open policy. 4. A valued policy.

1. An *interest* policy is, where the assured has a real, substantial, assignable interest in the thing insured⁵.

2. A *wager* policy is an insurance founded on an imaginary risk, where the insured has not any interest in the thing insured, and consequently cannot sustain any injury by the happening of the event insured against.

3. An *open* policy is, where the value of the thing insured is not inserted in the policy, and must therefore be proved at the trial, if a loss happens.

4. A *valued* policy is where the value of the thing insured has been settled by agreement between the parties, and that value inserted in the policy in the nature of liquidated damages so as to supersede the necessity of proving it, in case of a total loss. The custom of making valued policies arose soon after the stat. 19 G. 2. c. 37. and such policies were decided to be legal by Lee C. J. since which time the constant usage, in case of a total loss, has been to let the valuation stand, and the parties are estopped from altering it. That statute was made in order to prohibit mere wagering policies by persons insuring who had no interest in the thing insured, and therefore it avoids policies made, *interest or no interest*, or without further proof of interest than the policy itself. The effect, therefore, of a valued policy is

c *Kaines v. Knightly*, Skinn. 54. See d *Weston v. Emes*, 1 Taunton's R. also *Henkle v. the Royal Exch. Ass.* 115.
Comp. 1 Vez. 317. e *Marshall*, 199.

(4) A mistake in a policy may be altered, *by consent*, after it is underwritten. *Bates v. Graham*, Salk. 444. In a case where the clerk of the underwriter had been guilty of a mistake, and had not pursued the written instruction of the underwriter, a court of equity decreed relief. *Motteux v. Gov. and Comp. of London Assurance*, 1 Atk. 545.

not to conclude the underwriter from shewing that the assured had no interest^f, and that in fact it was a mere wagering policy within the statute; but in order to avoid disputes as to the quantum of the interest of the assured, the parties agree that it shall be estimated at a certain value.

Requisites of the Policy.—In order to illustrate the nature of the policy, it will be proper to consider the essential parts of which it is composed, which are as follows: 1. The name of the party insured, or of his agent. 2. The name of the ship. 3. The subject matter of the insurance. 4. The voyage insured. 5. The perils against which the insurer undertakes to indemnify the assured. 6. The memorandum. 7. The date and subscription. 8. The stamp.

1. *The Name of the Party insured.*

A custom prevailed formerly of effecting marine insurances in blank, that is, without specifying the name of the person for whose benefit such insurances were made, This practice having been found productive of great inconvenience, it was enacted, by stat. 25 G. 3. c. 44. that where policies were made by persons residing in Great Britain, the names of the persons interested should be inserted therein, or the names of the persons who should effect the same, as agents for the persons interested, and in the case of persons not residing in Great Britain, the names of the agent. Soon after this statute was passed, a question arose upon it, whether, when an agent effected a policy for his principal residing abroad, it was necessary that the name of the agent should be inserted in the policy, *eo nomine*, as agent. The Court of King's Bench were clearly of opinion that it was necessary^g. It was also holden to be necessary, that the names of *all* the persons interested should be inserted^h.

The provisions of the preceding statute having been found to be injurious to the interests of the ship-owners and merchants, and inadequate to the purpose for which they were designed, the legislature again interposed, by repealing this statute, and enacting anotherⁱ, whereby it was declared, "that no person should effect any policy on any ship, goods, or other property, without first inserting the names,

^f Per Lawrence J. in *Shawe v. Felton*, 2 East, 116. ^h *Wilton v. Reaston*, London Sittings after M. T. 1797. Park, 18.

^g *Pray v. Edie*, 1 T. R. 314.

ⁱ 25 G. 3. c. 56.

or usual stile and form of dealing (5), of the persons interested in such assurance; or of the consignors or consignees of the property insured; or of the persons residing in Great Britain who receive the order for, and effect the policy; or of the persons who give the order to the agent immediately employed to effect the policy; and that every policy made contrary to the meaning of this act should be void (6.)"

It is not necessary under this statute (as it was under the former) that, where an insurance is effected by an agent, the name of the agent should be inserted in the policy, *eo nomine*, as agent. Hence where a policy was effected by A. and Co.^k (who were the brokers and general agents of the party interested), and A. and Co. were not described as agents in the policy; but it having been averred in the declaration, that "A. and Co. were the persons residing in Great Britain, who received the order for, and effected the insurance," it was holden sufficient.

In a case where the policy was effected by insurance-brokers^l, who stated themselves in the policy to have effected it "as agents;" and it was averred in the declaration that they were the persons residing in Great Britain who received the order for and effected the insurance; but it did not appear that they were in any other instance the agents of the party interested; it was objected, that a mere broker was not within the description of persons mentioned in stat. 28 G. 3., and that by the expression "as agents," used in the policy, the underwriter had been deceived, since he might have been led to suppose, that the brokers were the general agents of the plaintiff, which they did not appear to have been. But the court overruled the objection, conceiving that the intention of the legislature had been satisfied by inserting the name of the person immediately employed to effect the policy.

^k De Vignier v. Swanson, B. R. M.
39 G. 3. 1 Bos. & Bul. 346. n.

^l Bell v. Gilson, 1 Bos. & Pul. 345.

(5) The persons interested were denominated in the policy, "The trustees of Messrs. K. F. & Co." Lord Ellenborough thought that this might be considered as their usual stile and firm of dealing for the purposes of this act. Hibbert v. Martin, 1 Camp. N. P. C. 538.

(6) "This statute must receive the most liberal construction, that the words will bear." Per Buller J. 1 Bos. & Pul. 322.

A. having consigned a cargo to B.^m, transmitted the bills of lading to C. his (*i. e.* A.'s) general agent, with directions to deliver them to B., in order that B. might insure the cargo; shortly afterwards A. drew a bill of exchange on B. for the amount of the cargo in favour of C., and remitted the same to C. to procure acceptance. B. refused to accept the bill of exchange, and returned the bills of lading to C., who thereupon caused an insurance to be effected on the cargo in his own name, and having informed A. of what he had done A. approved of it. A loss happened. In an action on the policy it was averred, in the declaration, that the interest was in A., and that C. made the insurance as his agent, and for his use and benefit, and that, at the time of making it, C. resided in Great Britain. It was holden, that C. fell within the description of persons mentioned in the statute: 1. He might be considered as the consignee, inasmuch as he was the general agent of A., and had in his possession the bills of lading which had been returned by B., the original consignee. 2. He might be considered as the person who had received the order to insure; for the subsequent approbation of A. was equivalent to a previous order, and consequently the policy was well effected in the name of C.

2. *The Name of the Ship.*

THE name of the ship should be truly described in the policy, for if the underwriter should be deceived, or prejudiced by a false name having been given to him, he will not be bound. To avoid any inconvenience which may arise from a mistake in the name of a ship, it is usual to add in the policy, to the name given, these words, "or by whatever other name or names the same ship should be called;" in which case, although it should appear that the real name of the ship was different from that inserted in the policy, yet, if the identity of the ship can be proved, and if it does not appear that the underwriter will sustain any prejudice, the variance will be held immaterial.

As where an insurance was made upon a ship called the *Leopard*ⁿ, "or by whatsoever other name or names the same ship should be called," whereof was master, for that voyage, A. B., and upon the evidence of A. B. it appeared, that the ship of which he was master was called the *Leonard*, and

^m *Wolff v. Horncastle*, 1 Bos. & Pul. 316.

ⁿ *Hall v. Molineaux*, London Sittings, 17th Dec. 1744. coram Lee C. J.

cited and recognised by Lawrence J. in *Le Meaurier v. Vaughan*, 6 East, 385.

was never called by the name of the *Leopard*; it was holden, by Lee C. J. that by reason of the general words, "by whatsoever name, &c." it was only necessary to prove the identity, which was done here by A. B., who said that he was master of the *Leonard*. So where a broker had received instructions to insure goods on board an American ship, called "the *President*," but by mistake had stated it in the policy all as one name of a ship, called "the American ship *President*," instead of stating it as part name and part description; it was holden, that the general words, or "by whatever other name called," had cured the mistake, the identity of the ship in which the goods were lost, with that in which they were insured for the voyage, being proved, and it not appearing that the underwriter could be prejudiced by the mistake.

3. *The subject Matter of the Insurance.*

The subject matter of the insurance ought to be inserted in the policy, that is, whether it be ship, goods, freight, &c.; but it is not necessary that the particular kind of goods should be specified. It will be proper, however, to remark, that *respondentia* cannot be insured under the denomination of *goods*. By the custom of merchants, *respondentia* must be insured under a special denomination⁷ (7). Provisions which are necessary for the use of the ship's crew, and on board at the time of insurance, are comprehended under the word "*furniture*," and are protected by a policy on the ship and furniture.

4. *The Voyage insured.*

The voyage insured must be truly and accurately de-

• *Le Mesurier v. Vaughan*, 6 East, 388. p *Glover v. Black*, 3 Burr. 1394. 1 Bl. R. 405. *Brough v. Whitmore*, 4 T. R. 206.

(7) In *Gregory v. Christie*, T. 21 G. 3. B. R. Park, 11. Marshall, 94. 225. S. C., an insurance had been made on behalf of the captain of an East Indiaman on "goods, specie, and effects," on board his ship; the plaintiff claimed to recover money which he had expended for the use of the ship, and for which he charged *respondentia* interest: it was proved by several East India captains, that this kind of interest was always insured under the denomination of "goods, specie, and effects." The court held, that under this express usage the plaintiff was entitled to recover.

scribed in the policy¹, namely, the time when, and place at which, the risk is to begin, the place of the ship's departure, the place of her destination, and the time when the risk shall end.

A ship was insured "at and from Genoa," her loading consisting of perishable commodities². This loading was put on board at Leghorn, whence the vessel had sailed, bound for Dublin; but losing her convoy she had put into Genoa, where she lay nearly five months, and then sailed. The insurance was made a few days after the ship had sailed from Genoa, at which time the above-mentioned circumstances were known to the insured, but not communicated to the underwriter. A few days after the ship put to sea she was shattered by a storm, and the cargo considerably damaged. In an action on the policy, it was proved that it had been always considered as material to acquaint the underwriter, whether the insurance was to be at the commencement or in the middle of a voyage. It was holden, that the plaintiff was not entitled to recover.

In an action upon a policy of insurance³ at and from *all, any, or every port and place on the coast of Brazil, and after the 17th day of September to the Cape of Good Hope, upon goods and ship*, beginning the adventure upon the goods from the loading thereof aboard the ship, *at all, any, or every port and place on the coast of Brazil, and from the 17th day of September, 1800*; and upon the ship in the same manner; it appeared that the goods, for the loss of which the plaintiff declared had been put on board at the Cape. It was holden, that the plaintiff could not recover; for the obvious meaning of the policy was, that the adventure was to attach on goods and ship, after a loading of goods had taken place on the coast of Brazil; and as that circumstance or event never took place in the present instance, the policy of course never attached at all.

If a ship be insured for one voyage⁴, and sails upon another, although she be taken before she arrives at the dividing point of the two voyages, the policy is discharged. So if a ship, insured from a certain time⁵, sail *before* the time on a different voyage from that insured, the assured cannot recover, though she afterwards get into the course of the voyage described in the policy, and is lost *after* the day on which the

q Marshall, 227. Smith v. Yelton, D. P. 21 July, 1806.

r Hodgson v. Richardson, 1 Bl. Rep. 463.

s Robertson v. French, 4 East, 130.

See Spitta v. Woodman, 2 Taunt.

416. Homeyer v. Lushington, B. R. H. 52 G. 3.

t Wooldridge v. Boydell, 1 Doug. 16.

u Way v. Modigliani, 2 T. R. 30.

policy was to have attached. It is to be observed^x, however, that if the termini of the intended voyage are the same with that described in the policy, a mere intention to touch at a particular port out of the usual track of the voyage insured will be considered only as an *intention to deviate*, and as such will not vacate the policy.

Goods were insured on board a vessel on a voyage from Liverpool to Palermo^y, Messina, and Naples. She cleared out for Naples only, and was captured before the dividing point. It was holden, that there was an inception of the voyage insured; that the voyage insured meant a voyage to all or any of the places, with this reserve only, that if the ship went to more than one place, she must visit them in the order described in the policy.

Goods were insured on board a ship from London to Nantz^z, with liberty to call at Ostend, and she was cleared only for Ostend, but sailed directly for Nantz, that being the known course of the trade, in order to save certain duties both in England and France. It was holden, that there was not any fraud on the underwriter so as to vacate the policy.

A ship, insured from A. to B. sailed with directions to the captain to touch at C.^a an intermediate point. To a certain point the voyage was the same; from that point there were three tracks to B., one by the way of C., the two others by different courses; there were advantages and disadvantages attending each, and it was usual for the captain to elect, according to circumstances: the ship took the track by C. with intent to put in there, but was taken before she actually came to the point, where she must have turned out of the track to B. by the way of C. for the purpose of putting into the harbour of C. It was holden, that the underwriter was discharged, because he was entitled to the advantage of the captain's judgment, in electing which of the three tracks it was best to pursue, when he came to the first dividing point.

A liberty "to cruise six weeks," in a policy of insurance, has been holden to mean six weeks successively, from the commencement of the cruise^b.

A policy of insurance was effected on a ship for a certain voyage^c, *with letters of marque, with leave to chase, capture, and man prizes*. It was holden, that acting as a convoy to a

^x Kewley v. Ryan, 9 H. Bl. 343.

^y Marsden v. Reid, 3 East, 572.

^z Planche and another v. Fletcher,

1 Doug. 250.

^a Middlewood v. Blakes, 7 T. R. 162.

^b Syres v. Bridge, Doug. 527.

^c Lawrence v. Sydebotham, 6 East, 45.

See Hibbert v. Halliday, 2 Taunt.

428.

prize, which the ship insured had taken, and slackening sail in the course of the voyage insured, in order to make the sailing of the ship insured conform to that of the prize, was not within the meaning of the terms, "chasing, capturing, and manning prizes."

See further on this subject, *Parr v. Anderson*, 6 East, 202.

5. *The Perils, against which the Insurer undertakes to indemnify the Assured.*

The perils and risks against which the insurer undertakes to indemnify the owners must be inserted in the policy. Molloy, in his *Treatise De Jure Maritimo*, says, that there is scarce any misfortune which is not provided against by the terms of the policy, which was used in his time, and there is in the modern printed form of policy an enumeration of the same adventures and perils, that is, "of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests."

In all our policies are inserted the words "lost or not lost," by which the insurer takes upon himself not only the risk of future loss, but also the loss, if any, that may already have happened⁴.

6. *Of the Memorandum.*

The underwriters of London, in order to protect themselves against small averages, which might be claimed in respect of perishable commodities, have inserted at the foot of the policy a memorandum to the following effect: "N. B. Corn (8), fish, salt (9), fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under five pounds per cent.; and all other

d Marshall, 237.

(8) The word *corn* comprehends pease. *Mason v. Skurray*, Marsh. 143. Park, 115. e. and malt. *Moody v. Surridge*, 2 Esp. N. P. C. 633. Kenyon C. J. but not rice. *Scott v. Bourdillon*, 2 Bos. & Pul. N. R. 213.

(9) The word *salt* does not comprehend saltpetre. *Journe v. Bourdieu*, Park, 113. per ~~Wilson~~ J.

goods, also the ship and freight are warranted free of average under three pounds per cent. unless general, *or the ship be stranded.*" The words in italics have been omitted for several years in the forms of policies adopted by the two insurance companies, viz. London Assurance and Royal Exchange Assurance.

By virtue of this memorandum, the insurer is not bound to make good any average or partial loss upon the articles specified in the memorandum, except a general average, or unless the ship be stranded.

The term *general average* requires explanation. Whatever damage or loss is incurred by any particular part of the ship or cargo *for the preservation of the rest*, such damage or loss shall be considered as *general average*; that is, these several parties interested in the ship or cargo shall contribute their respective proportions to indemnify the owner of the particular part for the damage which has been incurred *for the good of all*. From the preceding description, it appears, that, in order to constitute a general average, the whole adventure must have been in jeopardy.

A ship laden with coals and wheat*, (which were the subject matter of insurance) was forced, by stress of weather, into a harbour in Ireland, and there happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks, where she was stranded, and they would not leave her till they had compelled the captain to sell all the corn, except about ten tons, at a certain rate, which was about three-fourths of the invoice price. The ten tons were damaged in consequence of the stranding, and it became necessary that they should be thrown overboard. The ship afterwards arrived at her place of destination with the remainder of her cargo, which was about 25*l.* worth of coals. It was contended, that the loss sustained was a general, and not a particular average; but the court were of a different opinion, Lord Kenyon C. J. observing, that this was not a general average, because the whole adventure was never in jeopardy. There was not any pretence to say, that the persons who took the corn intended any injury to the ship, or to any other part of the cargo, except the corn, which they wanted in order to prevent their suffering in a time of scarcity; therefore the

* *Neabitt and another v. Lushington*, 4 T. R. 703.

plaintiffs could never have called on the rest of the owners to contribute their proportion as upon a general average.

Upon the other branch of the exception^f, viz. the words "unless the ship be stranded," it has been holden, that the underwriter is liable for an average loss upon the articles specified in the memorandum, where there is a stranding, although no part of the loss happen in consequence of the stranding, provided such average loss arises from one of the perils insured against (10).

Where there is neither general average nor stranding^g, it seems that the underwriter is not liable at all, if the commodity specifically remain, although the damage sustained may amount to a total loss.

The Royal Exchange Assurance Company is liable for a total loss upon a cargo of wheat, where the ship, from the perils insured against, becomes incapable of pursuing the voyage, and another vessel cannot be procured to forward the cargo^h.

7. *The Date.*

Regularly the policy should be datedⁱ, that is, to each subscription, for each subscription makes a distinct contract; the day on which, and the month and year in which it is made ought to be added. The insertion of a date may tend to the discovery of fraud, and consequently ought not to be omitted. It is usual, although not essentially necessary, to specify the sum insured; and the mode of doing this is, by writing the sum in words, and not in figures, in order to prevent any alteration being made.

8. *The Stamp.*

The policy must be duly stamped.

^f *Cantillon v. London Ass.* cited by Norton, 3 Burr. 1553. 2 Mag. 885.
^g *Burnett v. Kensington*, 7 T. R. 210.
^h *Mason v. Skurray*, London Sittings, after H. T. 1780, coram Lord Mansfield. C. J. Park, 116. *Cocking v. Fraser, Park*, 114. *Marsh*. 144.
ⁱ Per Lord Ellenborough C. J. *Wilson v. R. E. Ass. Comp.* 2 Camp. N. P. C. 623. See also *Manning v. Newnham*, ib. 624. n. *Marsh*, 241.

(10) "When a ship is stranded, the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained." Per Lord Kenyon C. J. 4 T. R. 787.

The amount of the present stamp duties (1812) on marine insurances, is fixed by stat. 48 G. 3. c. 140. Sch. Part I. and is as follows (11) :

I. Policies upon ship, goods, or any other interest, (which may be legally insured) for any voyage *to or from* any port or place in Great Britain and Ireland, or Guernsey, Jersey, Alderney, or Sark, or the Isle of Man, or *from or to* any other port or place in Great Britain, &c.

	£.	s.	d.
Where the premium or consideration shall not exceed the rate of 20s. per centum on the sum insured, if the whole sum insured shall not exceed 100l.	0	1	3
And if the whole sum insured shall exceed 100l., then for every 100l. and also for any fractional part of 100l.	0	1	3
And where the premium or consideration shall exceed the rate of 20s. per cent. on the sum insured, if the whole sum insured shall not exceed 100l.	0	2	6
And if the whole sum insured shall exceed 100l. then for every 100l. and also for any fractional part of 100l.	0	2	6
But if the <i>separate interests</i> of two or more distinct persons shall be insured by one policy or instrument, then the said duty of 1s. 3d. or 2s. 6d. shall be charged thereon, in respect of each and every fractional part of 100l. as well			

(11) Before this act was passed the stamp duties on policies were regulated by stat. 35 G. 3. c. 63. and 41 G. 3. c. 10. It will be proper to remark, that these statutes are not wholly repealed; for by stat. 44 G. 3. c. 98. s. 8. it is expressly enacted, "that all paper, &c. upon which any matter is written, and by this act made liable to the payment of duty, is hereby made (except where any alteration is expressly made by this act) subject to all the conditions and restrictions to which such paper, &c. was subject by any acts of parliament in force before or on the tenth day of October, 1804, and every penalty (except where any alteration is expressly made by this act) for any offence committed against any of the said acts and the several clauses therein contained, (unless where expressly altered by this act,) are declared to extend to, and shall be applied and put in execution, in respect of the several duties by this act charged, in as full a manner as if all the clauses were re-enacted in the body of this act."

as in respect of every full sum of 100*l.* thereby insured.

II. Policies upon ship, goods, or other property on board, or upon freight, or other interest (which may lawfully be insured) for any *other voyage* than is before specified, or for any certain term or period of time, not exceeding twelve calendar months:

£. s. d.

Where the premium or consideration shall not exceed the rate of 20*s.* per cent. on the sum insured, if the whole sum insured shall not exceed 100*l.* - - - - - 0 2 6

And if the whole sum insured shall exceed 100*l.* then for every 100*l.* and also for any fractional part of 100*l.* - - - - - 0 2 6

And where the premium or consideration shall exceed the rate of 20*s.* per cent. on the sum insured,

If the whole sum insured shall not exceed 100*l.* 0 5 0

And if the whole sum insured shall exceed 100*l.* then for every 100*l.* and also for any fractional part of 100*l.* - - - - - 0 5 0

But if the *separate interests* of two or more distinct persons shall be insured by one policy or instrument, then the said duty of 2*s.* 6*d.* or 5*s.* shall be charged thereon, in respect of each and every fractional part of 100*l.* as well as in respect of every full sum of 100*l.* thereby insured.

III. Policy of insurance, or other instrument whereby any insurance, commonly called a *mutual insurance*, shall be made, without any premium or pecuniary consideration, from any loss that might happen to any vessel or merchandize, on board of any vessel, or freight, or other interest relating to any vessel, which may be lawfully insured.

£. s. d.

Upon any voyage from any port or place in the United Kingdom of Great Britain and Ireland, the Islands of Guernsey, Jersey, Alderney, or Sark, or the Isle of Man, to any other port or place in the said kingdom or islands, or Isle of Man; for every sum of 100*l.* and also for each and every fractional part of 100*l.* - - - - - 0 2 6

Upon any other voyage, or for any certain term or period of time, not exceeding twelve calen-

dar months; for every sum of 100*l.* and also for each and every fractional part of 100*l.* - 0 5 0

A policy of insurance was subscribed by the defendant on the 5th of February, 1800^a, and duly stamped, purporting to be a policy "on goods and specie on board of ship or ships sailing between the 1st of October, 1799, and the 1st of June, 1800, being the property *which should first sail to* a certain amount, and upon the vessels carrying the goods." After the 1st of June, 1800, but before any notice of the determination of the risk (12) had been received, a memorandum was written on the policy, and subscribed by the defendant, whereby it was agreed to extend the time of sailing to the 1st of August, 1800. It was holden, that although by this memorandum the time of sailing was extended, yet the object of the insurance continued the same, and consequently the memorandum falling within the proviso contained in the 13th section of the stat. 35 G. 3. c. 63. (13) did not require a stamp.

k Kensington v. Inglis, in error, 8 East, 273.

(12) By these words, "determination of the risk," is to be understood either the loss or safe arrival of the thing insured, or the final end and conclusion of the voyage.

(13) The stat. 35 Geo. 3. c. 63. s. 13, provides, "that the act shall not extend to prohibit the making any alteration which may lawfully be made in the terms or conditions of any policy of insurance, duly stamped, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, &c. and so that the thing insured shall remain the property of the same persons; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by means of such alteration." The words "the thing insured shall remain the property," &c. apply to one identical and continued subject matter all along remaining the property of the same proprietor, and will not comprehend a case where the thing last insured is not only in fact, but in name and kind, as a specific object of insurance, essentially different from the thing first insured, and which begins also to have an existence at a much later period than the other, and when the thing first insured scarcely, or in a small degree only, remains or continues to exist at all. Hence, where the original policy was "on ship and outfit" at and from London to the South Seas, during the ship's stay and fishing there, and at and thence to Great Britain, &c.; and after the ship had sailed on the voyage insured, by consent of the underwriters, the policy was altered, and declared to be on the ship and goods, instead of ship and outfit. It

Rule of Construction.—The same rule of construction, which applies to all other instruments, applies equally to a policy of assurance¹, viz. that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect, is, that the greater part of the printed language of them being invariable and uniform, has acquired, from use and practice, a known and definite meaning, and that the words superadded in writing, subject indeed always to be governed in point of construction by the language and terms with which they are accompanied, are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties for the expression of their meaning, and the printed words are a general formula adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects.

¹ Lord Ellenborough C. J. delivering the judgment of the court in *Robertson v. French*, 4 East, 156.

was holden, that as the outfit for such a voyage as was described in the policy differed materially from what was comprehended under the term *goods*, the policy in its altered state required an additional stamp within the meaning of the preceding section. *Hill v. Patten*, 8 East, 373. cited in *Bathe v. Taylor*, B. R. E. 52 G. 3. It was holden afterwards, that the assured could not recover upon the policy in its original state, as an assurance on "ship and outfit," by reason of the alteration apparent on the face of the instrument, such alteration having been made by the parties interested. *French v. Patten*, 9 East, 351.

III. *What Persons may be insured—Who may be Insurers—What may be insured.*

What Persons may be insured.

In this country all persons, whether British subjects or aliens, may, in general, be insured. But an action cannot be maintained on a policy at the suit or on the behalf (14) of an alien enemy during war, although the property insured be of British manufacture, and exported from this country^m (15). A neutral, however, although domiciled and carrying on trade in an enemy's country, in partnership with an alien enemy, may insure his interest in the joint property, and on coming into this country may sue for the recovery of a loss arising from one of the perils insured againstⁿ.

Who may be Insurers.

At the common law, any person in his individual and se-

^m *Brandon v. Nesbitt*, 6 T. R. 23. *Bris-* *n* *Rotch v. Edie*, 6 T. R. 413.
ⁿ *tow v. Towers*, 6 T. R. 35.

(14) But where a ship belonging to an alien enemy is protected by the king's licence, an insurance may be effected on such ship by a British subject, as trustee on the behalf of the ship-owner, and an action on the policy may be maintained at the suit *of the trustee*, even in time of war, because the public policy of the country is not contravened by sustaining and giving effect to such trust; and although the king's licence cannot, in point of law, have the effect of removing the personal disability of the ship-owner, (being an alien enemy) in respect of suit, so as to enable him to sue in his own name, yet it purges the trust in respect to him of all the injurious qualities in regard to the public interest. *Kensington v. Inglis*, 8 East, 273.

(15) An English subject who lives and carries on trade under the protection and for the benefit of an hostile state, and who is so far a merchant settled in the state that his goods would be liable to confiscation in a court of prize, is not to be considered as entitled to sue as an English subject in an English court of justice. Residing under the allegiance and protection of an hostile state, he may be considered, to all civil purposes, as much an alien enemy as if he were born there. But if he reside in a neutral country, he is entitled to all the privileges of a neutral country. See *McConnell v. Hector*, 3 Bos. & Pul. 113.

parate capacity, or any number of persons forming a society or partnership, might have been insurers; but it having been found by experience that particular underwriters, after having received large premiums for the insurance of ships, &c. at sea, became bankrupts, or otherwise failed in answering or complying with the terms of their policies of assurance, to the ruin of many merchants, and to the discouragement of adventurers at sea, and to the great diminution of the trade and public revenues of the kingdom, it was deemed advisable to establish two distinct corporations, with competent funds for assurance of ships, goods, or merchandizes at sea, or going to sea, on the supposition that merchants would think it much safer to depend on the assurances of either of these corporations, than on those of private or particular persons; at the same time leaving to the merchants their option to assure with private underwriters, if they should prefer it. To carry this design into effect, the stat. 6 G. 1. c. 18. (A. D. 1719,) authorized the king to grant charters to two distinct companies for assurance of ships, goods, and merchandizes at sea, or going to sea, and for lending money on bottomry.

In pursuance of the powers given by this statute, the Royal Exchange Assurance and the London Assurance Companies were established by charters, bearing date the 22d day of June, 1720.

By the 12th section of the before-mentioned statute, in order to prevent any competition between these two corporations, and any other public body, it is enacted, that "all corporations, societies, and partnerships (other than the said two corporations) shall be restrained from underwriting; and if any corporation, or any persons acting in a society or partnership, (other than the two corporations) shall presume to underwrite any policy *upon ships, goods, or merchandize, at sea, or going to sea*, every such policy shall be *ipso facto* void (16), and the sums underwritten shall be forfeited; and bonds or other securities, for money lent by way of bot-

(16) It appears to have been the opinion of two eminent judges*, that where a single name appears on the policy, the insurer will not be allowed, if a loss happens, to defeat a *bona fide* insurance, by alleging to an innocent person, that there was a secret partnership between himself and another.

* Eyre C. J. in *Mitchell v. Cockburn*, and Kenyon C. J. in *Sullivan v. Greaves and Booth v. Hodgson*.

from thence to the West Indies; and which, as it was said, turned on the entirety of the voyage insured, the freight being covenanted to be paid for the said voyage, according to a stipulated rate per pipe for 500 pipes of wine; whereas, this was an open policy, and the freight was to be estimated according to the quantity of goods on board, of which there never were any, and therefore no inception of the freight, and consequently not of the insurance upon it: and this, it was argued, was the same as if the ship had sailed from Dominica without any goods on board; but the objection was overruled, Lord Ellenborough C. J. observing, that it was clear that the underwriter was liable, upon the authority of *Thompson v. Taylor*, the voyage having commenced in which the freight was to be earned according to the terms of the charter-party, which made it one entire contract, and which voyage was insured by the policy; that in *Thompson v. Taylor*, the loss happened before the ship arrived at Teneriffe, where she was going to fetch her freight, and yet the underwriter was holden to be liable.

IV. Of Losses,

1. *By Perils of the Sea.*
2. *By Capture.*
3. *By Arrests, &c.*
4. *By Barratry.*
5. *By Fire.*

1. *By Perils of the Sea.*—Losses by *perils of the sea* are understood to mean only such as proceed from mere sea damage^a; that is, such as arise from stress of weather, winds, and waves, from lightning and tempests, from striking against rocks, from sands, &c.

If there has not been any intelligence received of a ship within a reasonable time after she has sailed^b, it will be presumed, that she perished at sea, and the assured may maintain an action against the underwriter, stating the loss to have happened by the vessel sinking at sea^c. What shall be deemed a reasonable time, must depend on the distance and length of the voyage, &c.

Evidence of the vessel having sailed on her intended voyage on such a day, and not having been heard of since,

^a Marsh. 416.

^b Park, 63.

^c Green v. Brown, Str. 1199. See also

Newby v. Read, Sittings after M. T. 1763, coram Ld. Mansfield C. J. Park, 63.

is the best evidence, of which the nature of such a case admits, and, consequently, will be sufficient to support the action. It is not necessary to call witnesses from the vessel's port of destination; it is sufficient to prove that she was not heard of in this country after she sailed^d. But it must be shewn, that when the ship left the port of outfit, she was bound on the voyage insured^e. For this purpose the *convoy bond*^f mentioning the port of destination in the common form, or a licence^g, is *primâ facie* evidence.

Under a count for a loss by perils of the sea^h, evidence that the ship was destroyed by a species of worms which infest the rivers of Africa, was holden not to support the declaration.

It is the province of the jury to determine, whether the cause of the loss be a peril of the sea or notⁱ.

In cases of insurances upon goods, where, by the terms of the policy, the underwriter is to continue liable until the goods are safely landed, if one of the public lighters, entered at Waterman's Hall, be employed for the purpose of landing the goods, and the goods sustain a damage on board such lighter, without any negligence on the part of the lighterman, the underwriter will be responsible for the loss^j; but if the owner of the goods chooses to employ his own private lighter to land them^k; or if after the goods are put on board a public lighter, the owner takes them into his own custody and possession, and discharges the lighterman^l, the underwriter in such cases will not be liable.

2. Loss by Capture.

Capture is the taking the ship or goods by an enemy of the country to which the ship and goods belong, when in a state of public war.

To constitute a loss by capture within the meaning of the

^d *Twenlow v. Oswin*, 2 Camp. N. P. C. 85.

^e *Cohen v. Hinckley*, 2 Camp. N. P. C. 51.

^f *lb. S. C.*

^g *Marshall v. Parker*, 2 Camp. N. P. C. 70.

^h *Rohl v. Parr*, London Sittings after H. T. 1796. Park, 63.

ⁱ Per Kenyon C. J. in *Buller v. Fisher*, Abbott, 236.

^k *Rucker v. London Assurance Comp.*, London Sittings, June, 1784, per Buller J. *Hurry v. Royal Exch. Ass.*, 2 Bos. & Pul. 430.

^l *Sparrow v. Carruthers*, Str. 1296.

^m *Strong v. Natally*, 1 Bos. & Pul. N. R. 16.

policy^a, it is not necessary, that the ship should be condemned, or carried into any port or fleet of the enemy.

In every case of capture^b, the insurer is answerable to the extent of the sum insured for the loss actually sustained. This may be either *total*, as where the thing insured is not recovered again; or *partial*, as where the ship is recaptured or restored *before abandonment*; in which case the insurer is bound to pay the salvage, and any other necessary expense, which may have been incurred by the party for the recovery of his property.

In *assumpsit* upon a policy of insurance^c, *interest or no interest*, against enemies, pirates, takings at sea, &c. it appeared, that the ship was taken by a Swedish pirate, and remained in his possession for nine days, and then was retaken by an English man of war, and, after the suit commenced, brought into Harwich; it was holden, that the plaintiff was entitled to recover; for though the ship was retaken, yet the plaintiff had received a damage by the interruption of his voyage: and the question was not, whether the plaintiff had his ship, and did not lose his property, but what damage he had sustained.

In a case where a privateer had been insured^d, *interest or no interest, free from average, and without benefit of salvage*, for a cruise of three months, and during that time she was captured, whereby she was prevented from finishing her cruise; it was holden, that the assured was entitled to recover for a *total* loss, although it did not appear, that the ship was ever carried *infra præsidia hostium*, and although the ship was retaken before the expiration of the three months.

See further on this subject, *Whitehead v. Bance*, Park, 77. and *Dean v. Dicker*, Str. 1250.

A ship warranted neutral was captured as an enemy's ship, and the owners, after an interlocutory decree against them, agreed to a compromise^e; this being done *bond fide*, it was holden, that the insurer was liable for the sum paid by the insured under such compromise.

Formerly, it was a common practice, when vessels were captured by the king's enemies, or by other persons committing acts of hostility, for persons to agree with the captors for ransom of the vessels, and for securing the stipulated

^a Per *Ld. Mansfield C. J.* in *Goss v. Withers*, 2 Burr. 694.
^c *Marsh.* 422.

^b *Depaiba v. Ludlow*, Comyns R. 260.
^d *Pond v. King*, 1 Wils. 191.
^e *Berens v. Rucker*, 1 Bl. R. 613.

ransom, not only to give hostages, but also to bind themselves, or the owners, for the payment thereof (18). The law of nations gave a sanction to this practice; but it having been found, by experience, liable to great abuse, and there being reason to apprehend, that upon the whole it operated more to the disadvantage than the benefit of his Majesty's subjects, it was enacted by stat. 22 G. 3. c. 25. s. 1. "That it should not be lawful for any of his Majesty's subjects to ransom, or enter into any agreement for ransoming, any vessel belonging to any of his Majesty's subjects, or any goods on board the same, which should be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects." By s. 2. "Agreements entered into, and bills, notes, and other securities given by any persons for ransom of such ship or vessel, or of any goods on board the same, are declared void." And by s. 3. a penalty of 500*l.* is given to the informer for every offence against this act. This statute having expired with the termination of hostilities in 1783, the same provisions have been repeated verbatim in subsequent prize acts. See st. 33 G. 3. c. 66. s. 37, 38. during last war, and st. 43 G. 3. c. 160. s. 34, 35. now in force.

Although, by the terms of the policy, the underwriters undertake to indemnify the assured against *all* captures and detentions of princes, without any exception in respect of the acts of the government of their own nation, yet has the law engrafted an exception thereon of captures made by the authority of the government of the country to which the

(18) When this agreement was reduced into writing, the instrument containing the terms of it was denominated a ransom bill. See the form, Doug. 641. This instrument usually provided for the safety of the captured vessel during the remainder of her voyage, and actions of assumpsit were brought upon these bills. See the form of declaration, 3 Burr. 1734. but in *Anthon v. Fisher*, Doug. 648. it was decided, that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war. Since the stat. 22 G. 3. c. 25. and 43 G. 3. c. 160. s. 34, 35. the law relating to ransom bills is become a mere matter of curiosity. The reader who is desirous of pursuing the subject, is referred to the following cases: *Richard v. Bettenham*, B. R. M. 6 G. 3. 3 Burr. 1734. 1 Bl. R. 563. *Cornu v. Blackburne*, B. R. E. 21 G. 3. Doug. 640. *Anthon v. Fisher*, B. R. M. 23 G. 3. Exch. Chamber, M. 25 G. 3. Doug. 648. n. (1). *Yates v. Hall*, B. R. M. 26 G. 3. 1 T. R. 73.

underwriters belong. Hence, it has been solemnly determined, that even after the cessation of hostilities between England and France, a Frenchman was not entitled to recover in the English courts upon a policy of insurance effected in England before the commencement of hostilities; for a policy, containing an insurance against British capture, *eo nomine*, would be illegal and void upon the face of it, as being directly and obviously repugnant to the interest of the state, having an immediate tendency to render ineffectual, to the extent of the indemnity created thereby, all offensive operations by sea adopted on the part of his Majesty and his subjects, for the purpose of weakening the strength and diminishing the resources of the enemy. And if an insurance by a British subject, made in terms against British capture, would be void, an insurance indirectly producing the same effect, by the application afterwards of the general terms of the insurance to the particular event (*i. e.*) of British capture, which takes place afterwards, must upon principle be equally illegal; and no peril, the subject of insurance, can be recovered under the generality of the terms "capture," "detention of princes," or the like, which cannot, consistently with law, be specifically insured against in direct and express terms.

It is to be observed, that although in cases of capture the underwriter is responsible to the assured, yet, if *before a demand* the ship be recovered, he is liable for the amount only of the loss sustained at the time of the demand; or if the ship be restored after payment by the underwriter, he shall stand in the place of the assured.

By stat. 43 G. 3. c. 160, s. 39. (the last prize act) it is enacted, "That if any ship, vessel, or boat, taken as prize, or any goods therein, shall appear and be proved in a competent court of admiralty to have belonged to any of his Majesty's subjects, which were before taken by any of his Majesty's enemies, and at any time afterwards retaken by any of his Majesty's ships of war, privateer, or other vessel or boat under his Majesty's protection, such ship, &c. shall be adjudged to be restored by decree of the said court of admiralty to the former owners, on their paying for, and in lieu of salvage, 1. If retaken by any of his Majesty's ships, or hired armed ships, one *eighth* part of the true value of the ship, &c. 2. If retaken by any privateer, or other ship, &c. one *sixth* part of the true value, &c.; and, 3. If retaken by the joint

¹ *Furtado v. Rodgers*, 3 Bos. & Pul.
191. *Gamba v. Le Mesurier*, 4 East,

307. *Kellner v. Le Mesurier*, 4 East,
396.

operation of one or more of his Majesty's ships, and one or more private ships, such salvage as the judge of the High Court of Admiralty, or other court having cognizance thereof, shall, under the circumstances of the case, deem fit; *unless* the vessel retaken appears to have been, after the taking by his Majesty's enemies, by them set forth as a vessel of war, in which case it shall not be restored to the former owners, but shall (whether retaken by his Majesty's ships or by a privateer) be adjudged lawful prize for the benefit of the captors."

And by s. 40. it is enacted, "that vessels or goods taken or retaken, and restored by the commander, &c. of the privateer, &c. through consent, or clandestinely, or by collusion or connivance of such commander, &c. *without being brought to adjudication*, shall, upon proof thereof in a court of admiralty, be adjudged good prize, one moiety thereof to the king, and the other to the discoverer; provided*, that if a ship be retaken before she has been carried into an enemy's port, it shall be lawful for her, if the recaptors consent thereto, to prosecute her voyage, and it shall not be necessary for the recaptors to proceed to adjudication till six months, or till the return of the ship to the port from which she sailed: and the master, owners, or their agents may, with the consent of the recaptors, unliver and dispose of their cargoes before adjudication; and in case the vessel shall not return directly to the port whence she sailed, or the recaptors shall have had no opportunity of proceeding regularly to adjudication within six months, on account of the absence of the vessel, the court of admiralty shall, at the instance of the recaptors, decree the restitution to the former owners, paying salvage, upon such evidence as shall appear reasonable, the expense of such proceeding not to exceed the sum of fourteen pounds."

Under this head it will be proper to consider the effect and operation of an embargo on the contract of insurance.

An embargo is an arrest laid on ships or merchandize by public authority, or a prohibition of state, commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports.

Where a neutral insures* in this country a ship "*at and from a port in a foreign country*;" and while the ship remains in that port, an embargo is laid on by the *foreign state*,

the assured will, if the embargo continue, be entitled to abandon, and to recover for a total loss; for such an embargo is within the meaning of the words "arrests, restraints, and detentions by kings, princes, and people."

What would be the effect of an embargo laid on by the government of this country upon a ship insured here, has not been solemnly determined. It seems, however, that although one British subject might insure another British subject against the consequences of an embargo laid on by the British government, yet an insurance for the benefit of a *foreigner* against such an embargo would be illegal.

3. Loss by Arrests, &c.

Among other perils, which the assurers, in the language of the policy, are contented to bear, and do take upon them in the voyage, are "arrests and detentions of all kings, princes (19), and people, of what nation, condition, or quality soever."

The word "people" means the ruling or supreme power of the country, whatever it may be. This appears clearly from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of pirates, rogues, thieves. The words, therefore, "kings, princes, and *people*," must apply to nations in their collective capacity. Hence, where a party of rioters boarded a ship, and, having taken the command, stranded her, and compelled the captain to sell the cargo, which consisted of wheat, at their own price, and much below its real value, it was holden that the plaintiff, who had insured the cargo, could not recover on a count stating that the vessel was *arrested, distrained, and detained by people* to the plaintiff unknown, by reason whereof the cargo was wholly lost to the plaintiff.

y See Marsh. 437. Green v. Young, z Opinion of the Judges in *Touteng v. Ld. Rayn.* 840. Salk. 444. and Ld. Hubbard.
Alvanley's opinion in *Touteng v. a Nesbitt v. Lushington*, 4 T. R. 783.
Hubbard, 3 Bos. & Pul. 302.

(19) By the word "princes," according to the opinion of Lord Mansfield, in *Goss v. Withers*, 2 Burr. 696. must be understood, not enemies merely, but those in amity also. Hence it is said, that by the general law, the assured may abandon in the case of an arrest or detention by a prince not an enemy.

4. *Loss by Barratry* (20).

The original meaning of the term "barratry" is to be collected from the Italian language, and is, according to Dufresne's Glossary, (*verbum barratria,*) "*fraus, dolus, qui fit in contractibus et venditionibus*." He does not apply it in any marine sense, or with reference to the particular relation of masters and owners. In that sense, however, in which it is particularly used, as applied to subjects of British marine insurance, in the earliest reported case, which we find on the subject, it is considered as being precisely tantamount to fraud, in the particular relation which subsists between master, mariners, and owners, being such by which a loss may happen to the subject matter insured. And as no limitation is put upon the term "fraud," in that case, the court must be understood as holding, that fraud and barratry were in effect words of co-extensive import; that is, that barratry included *every species of fraud* in the relation of the master to his owners, by which the subject matter insured might be endangered.

In conformity with this opinion, Willes J. in giving the judgment of the court in *Lockyer v. Offey*, 1 T. R. 252. defines *barratry* as including "every species of fraud or knavery of the master of the ship, by which the freighters or owners (the freighters in that case were owners *pro tempore*) are injured."

Barratry may be committed either by a wilful deviation^d, in fraud of the owner, by smuggling^e, by running away with

^b Per Ld. Ellenborough C. J. delivering the judgment of the court in *Earle v. Rowcroft*, 8 East, 134. ^c *Knight v. Cambridge*, Str. 581.
^d *Vallejo v. Wheeler*, Cowp. 143. ^e 1 T. R. 252.

(20) "It is extraordinary that this species of loss, occasioned by the misconduct of the master, selected and appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance; and it is the more so, as it has an impolitic tendency to enable the master and owners, by a fraudulent and secret contrivance and understanding between them, to throw the ill success of an illegal adventure, of which the benefit, if successful, would have belonged solely to themselves, upon the underwriters. So, however, it is, that this description of loss has, from the earliest times, held its place as a subject of indemnity in British policies of insurance." Per Lord Ellenborough C. J. delivering the judgment of the court in *Earle v. Rowcroft*, 8 East, 134.

the ship, by sinking (21) or deserting her, or by defeating or delaying the voyage (22) with a criminal intent. If by reason of these, or other similar acts, the subject matter insured is detained, lost, or forfeited, the assured will be entitled to recover against the underwriter for a loss by barratry; and such acts being in violation of that duty which the masters and mariners owe to the ship-owners, the circumstance of the master or mariners conceiving that they were acting for the benefit of the owners will not vary the case. Hence where the master^f, under letters of marque, which for want of a certificate were not valid, (and which had been put on board by the owners with a view to encourage seamen to enter, and without any intention of their being used for the purpose of cruising,) had cruized for and taken a prize, in consequence whereof the vessel was lost; it was holden to be an act of barratry, although the master had libelled the prize in a court of admiralty, for the benefit of the owners as well as himself.

Neither is it necessary, in order to constitute barratry, that the master should derive, or even intend to derive, any benefit from the act done (23). Hence, where the master sailed out of port^g, without paying the port duties, whereby the ship was forfeited, it was holden to be barratry. So where the master^h, under general instructions from his owners to make the best purchases, with dispatch, went into an enemy's port, and traded there, on account of which illegal traffic, the vessel insured was seized by a king's ship, and afterwards condemned; this illegal act, unauthorised by the ship-owners, was holden to be barratry, although it did not appear that the master would have been benefited by the act, or that he intended thereby any thing

^f *Moss v. Byrom*, 6 T. R. 379.

^h *Earle v. Rowcroft*, 8 East, 126.

^g *Knight v. Cambridge*, as cited in 8 East, 135, 136.

(21) For the penal consequences attending the wilful destruction of ships, see stat. 1 Ann. stat. 2. c. 9. s. 4.; 4 G. 1. c. 12.; 11 G. 1. c. 29. s. 6, 7. As to the mode and place of trial for this offence, see stat. 28 H. 8. c. 15.; 43 G. 3. c. 79, Ireland, and c. 113, England.

(22) "Even dropping anchor *with a fraudulent intent* is barratry." Per Buller J. in *Ross v. Hunter*, 4 T. R. 38.

(23) But in some cases the circumstance of private benefit accruing to the master may be *evidence of fraud* in him.

more than to make the cheapest and speediest purchases for his employers (24).

In order¹, however, to constitute barratry, it is essentially necessary, that there should be fraud. Hence, a simple deviation, through the ignorance of the master, *without fraud* on his part, although it avoids the policy, will not amount to barratry (25). It is to be observed, that barratry, in the sense in which it is used in our policies, cannot be committed by any persons except masters, or mariners, nor against any persons except the *owners* of the ship²; but this term comprehends not only absolute owners, but owners *pro hac vice* only, as general freighters. Hence, if A. be the owner of a ship³, and let it out to B. as freighter, who insures it for the voyage, and the barratrous act, whereby the vessel is lost, is committed with the knowledge of A., yet if it be unknown to B. he may recover against the underwriter for a loss by barratry.

So where the insurance is made by and in favour of the ship-owner, and the barratrous act is committed with the privity of the freighter, the underwriter is not discharged⁴,

¹ *Phyn v. Royal Exch. Ass. Com.*,

7 T. R. 505.

² *Nutt v. Bourdieu*, 1 T. R. 323.

³ *Vallejo v. Wheeler*, Cowp. 143.

⁴ *Boutflower v. Wilmer*, London Sit-
tings after T. T. 21 G. 2. *ex am*

Lee C. J. MSS.

(24) It was contended in this case, on the part of the defendant, that if the conduct of the master, although criminal in respect of the state, were, in his opinion, likely to advance the owner's interest, and intended by him to do so, it would not be barratry; but to this the court said they could not assent, for it was not for him to judge in cases not entrusted to his discretion; or to suppose that he was not breaking the trust reposed in him, but acting meritoriously, when he endeavoured to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, not only from what ought to be, and therefore must be, presumed to have been their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means.

(25) "Barratry must be some breach of trust in the master, *ex maleficio*." Per Lee C. J. in *Stamma v. Brown*, as cited by Lawrence J. from a MSS. note in 7 T. R. 508. "No case of deviation, unless it be accompanied with fraud or crime, is within the true definition of barratry." Per Ellenborough C. J. in *Earle v. Rowcroft*, 8 East, 139. But where the deviation is such as amounts to barratry, the underwriter cannot insist on the deviation as a ground of objection against the right of the assured to recover.

unless he can shew that the ship-owner also was privy to the barratry.

It appears from the preceding remarks, that where the owner of the ship consents to the act done, such act is not barratry*. So where the master of the ship is also owner^o, he cannot commit barratry, because he cannot commit fraud against himself.

And the same rule holds in equity, where the owner having mortgaged the ship, acts as master^p, for the mortgagor is considered in equity as the owner of the thing mortgaged. But proof of the master having committed barratry is *prima facie* sufficient to entitle plaintiff to recover, without shewing negatively that the master was not owner or general freighter. If the underwriter insists on this as a defence, it is incumbent on him to shew that the master was also owner or general freighter.

It will be proper also to remark, that barratry cannot be committed against the owner of the ship with his consent.

It is not necessary that the loss, in consequence of the barratry, should happen in the very act of committing the barratry, it is sufficient if it happen at any time afterwards, and before the voyage insured is completed; but it must happen during the voyage insured, and within the time limited by the policy; for where the master^q, in the course of the voyage, committed barratry by smuggling, on his own account, by hovering, and running brandy on shore in casks under 60 gallons, and the ship afterwards arrived at the port of destination, and was there moored at anchor 24 hours in safety, after which she was seized by the revenue officers for the smuggling, it was holden, that the underwriter was discharged.

The captain of a ship insured^r, barratrously carried her out of the course of her voyage, procured her to be condemned in a vice admiralty court, sold her, and delivered her to the purchaser. In an action on the policy, to which the statute of limitations was pleaded, *Ld. Ellenborough* was of opinion, that the cause of action did not accrue, as the loss did not happen until the master had divested himself of the possession of the ship, by delivering her to the purchaser, and therefore, although the barratrous abandonment of the

* *Statma v. Brown*, Str. 1173. Nutt v. Boardien, 1 T. R. 328.

^o Admitted S. C. and in *Ross v. Hunter*, 4 T. R. 33.

^p *Lewin v. Sussno*, *Portleth. Dict.* vol. 1. p. 147. per *Ld. Hardwicke Ch.*

^q *Lockyer v. Offley*, 1 T. R. 351.

^r *Hibbert v. Martin*, 1 Camp. N. P. C. 539.

voyage, for the purpose of making away with the ship, and fraudulent condemnation had taken place more than six years before the commencement of the action, yet as the sale and delivery were within six years, the plea did not operate as a bar.

As it is not necessary to aver the fact whereby the loss is occasioned^a, in the very words of the policy, provided the fact alleged be within the meaning of these words, in a case where, by the policy, the insurance was against the barratry of the master, and the breach assigned in the declaration was, that the ship was lost by the fraud and neglect of the master, the declaration was holden to be good; for barratry imports fraud, and he who commits a fraud may properly be said to be guilty of a neglect, viz. of his duty.

5. *Loss by Fire.*

Fire is expressly mentioned in the policy as one of the perils against which the underwriters agree to indemnify the assured.

In an action on a policy^b, where the loss was stated to be by fire, it appeared that the ship in question having been chased by an enemy of superior force, the captain, in order to prevent her from falling into the hands of the enemy, set her on fire. It was holden, that this loss was covered by the policy; Lord Ellenborough C. J. observing, that if the ship is destroyed, it is immaterial whether it is occasioned by a common accident, or by lightning, or by an act done in duty to the state. Nor could it make any difference whether the ship was thus destroyed by third persons, subjects of the king, or by the captain and crew, acting with loyalty and good faith. Fire was still the *causa causans*, and the loss within the perils insured against.

V. *Of total Losses and Abandonment.*

A TOTAL loss is of two kinds; one, where the whole property insured perishes; the other, where the property exists, but the voyage is lost^c, or the expense of pursuing it exceeds

^a Knight v. Cambridge, Ld. Raym.

1349. Str. 591. 8 Mod. 230.

^b Gordon v. Rimmington, 1 Camp.
N. P. C. 123.

^c If the voyage be defeated, it is the same thing for this purpose as if the ship be lost. Lawrence J. 6 T. R. 425. But see Parsons v. Scott, 2 Taunt. 563.

the benefit arising from it. In the latter case, the assured may *elect* (26) to abandon to the underwriter all right to such part of the property as may be saved, and having given due notice of his intention to do so, the assured will then be entitled to demand a compensation as for a total loss; but if the assured does not in fact abandon (27), or if he omits to give the underwriter notice (28) of his having abandoned, or if, being required by the underwriter to assign over his interest in the property insured, he refuses to do so^x (29), he will not be entitled to claim as for a total loss.

When the assured has received intelligence of such a loss as entitles him to abandon^y, it is incumbent on him to make his election to abandon, and to give notice thereof to the underwriter *within a reasonable time*^z (30), after receipt of

x *Havelock v. Rockwood*, 8 T. R. 368. y *Mitchell v. Edie*, 1 T. R. 608. All-
more fully reported by N. Atcheson, wood v. Henckell, Park, 172.
8vo. 1800. z *Barker v. Blakes*, 9 East, 283.

(26) The assured is not in any case *bound* to abandon.

(27) An insurance was effected on some hogsheads of sugar on a voyage from Ostend to Havre. The vessel sailed from Ostend, but was forced on shore, and the cargo damaged. The assured wrote to the underwriters, to inform them of the circumstances, and of the injury which the sugars had sustained. The underwriters in answer desired, "that the assured would do the best with the damaged property." It was holden, that the letter, coupled with the answer, did not amount to an abandonment. *Thelluson v. Fletcher*, 1 Esp. N. P. C. 73. per Kenyon C. J.

(28) Notice of abandonment is necessary, although the ship and cargo has been sold and converted into money, when the notice of the loss was received. *Hodgson v. Blackiston*, Park, 172. a. n.

(29) In *Havelock v. Rockwood*, the insurers offered to settle with the insured, he first making an assignment of one fourth part of the value of the ship for their benefit. The sum insured not amounting to one-fourth, the plaintiff declined making the assignment. The court were of opinion, that, under these circumstances, the assured could not be considered as having abandoned; Kenyon C. J. observing, that the refusal to assign seemed to him to be equivalent to a refusal to abandon; and Grose J. intimating, that there should have been an offer on the part of the assured to assign such part as he was entitled to. See Atcheson's Report, p. 18.

(30) "An abandonment must be made within a reasonable time; and I rather conceive that it is the province of the judge to direct the jury as to what is a reasonable time, under the circumstances." Per Lord Ellenborough C. J. in *Anderson v. Royal Exch. Ass.*,

the intelligence; otherwise the assured will be considered as having waved his right to abandon, and in case any part of the property insured be saved, he can recover as for a partial loss only.

It may be collected, from the two following cases, under what circumstances the assured may elect to abandon, and claim as for a total loss.

A ship was freighted with fish^a, and was insured on a voyage from Newfoundland to the port of discharge in Portugal or Spain, without the Streights, or England. During the voyage a violent storm arose, in consequence of which it became necessary that part of the cargo should be thrown overboard, and the ship was so much disabled as to render it necessary for her to go into port to refit; but before she could reach any port, she was captured by the French, who took out nearly the whole of the crew, and sent them into France. The ship having remained eight days in possession of the enemy, but not having been carried into port, nor within the enemies' fleet, was recaptured and brought into Milford Haven. The assured immediately gave notice of their intention to abandon. The remainder of the cargo was spoiled whilst the ship lay at Milford Haven, and before she could be refitted. It was holden, that the loss being in its nature a total loss, at the time when it happened, the assured had a right of election to abandon; that the subsequent title to restitution, arising from the recapture of the ship, *which was not in a situation to pursue her voyage*, could not take away a right vested in the assured at the time of the capture, and consequently that the assured having given immediate notice of abandonment, were entitled to recover against the insurers for a total loss.

A ship and goods were insured for a voyage from Mountserrat to London^b. The ship was taken by an enemy who took out all the crew, part of the cargo (which consisted of sugars) and the rigging. She was afterwards recaptured and carried into New York, where the captain arrived on the 23d of June, and taking possession of her, found that part

^a *Goss v. Withers*, 2 Burr. 683.

^b *Miles v. Fletcher*, Doug. 230.

7 East, 43. "The assured must make his election speedily, whether he will abandon or not. He cannot lie by, and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them." Per Lord Kenyon C. J. in *Allwood v. Henckell*, Park, 172.

of what had been left of the cargo had been washed overboard; that 57 hogsheads of what remained were damaged, and that the ship was in such a state, that she could not be repaired without unloading her entirely. The owners had not any storehouses at New York, where the sugars could have been deposited while the ship was repairing, nor any agent there to advise the captain. No sailors were to be had. There was an embargo on all vessels at New York until the 27th of December, and by the destination of the ship, she was to have arrived at London in July. Thus circumstanced, the captain sold the cargo, and contracted for the sale of the ship, conceiving that he was thereby acting most beneficially for his employers. The captain did not know of the insurance. The assured, upon receiving intelligence of what the captain had done, offered to abandon to the underwriters, and made a demand as for a total loss. An action having been brought to enforce this demand, it was holden, that the assured were entitled to recover as for a total loss; Lord Mansfield C. J. observing, that it had been laid down, "that if the voyage was lost, or not worth pursuing, if the salvage was high, if further expense was necessary, if the insurers would not at all events, undertake to pay that expense, &c. the insured might abandon, notwithstanding a recapture."

It may be observed, that the preceding cases were cases of peculiar circumstances, that it ought not to be inferred from them, that in the case of a mere capture, followed by a recapture, that the insured may, after the recapture (31) abandon, and demand as for a total loss. The impropriety of making such an inference will appear from the following case:

A ship, valued at a certain sum^c, was insured on a voyage from Virginia or Maryland to London; during the voyage, the ship was captured by the French, who took out nearly the whole of the crew, and put in a prize-master to carry her to France. Having remained 17 days in possession of the enemy, she was recaptured by an English man of war, and carried into Plymouth, whence she was brought into

c *Hamilton v. Mendez*, 2 Burr. 1198. 1 Bl. R. 276.

(31) The assured, upon intelligence of a capture, may abandon, and claim as for a total loss. Admitted per Lord Kenyon C. J. in *M. Masters v. Schoelbred*, 1 Esp. N. P. C. 237; but if they neglect this opportunity, and afterwards the ship is recovered, the assured can only claim for the loss actually sustained. S. C.

the port of London, by the order of the owners of the cargo and the recaptors. The assured having received intelligence of what had happened, gave notice to the underwriters of his intention to abandon. It appeared, that no damage had been sustained from the capture, except what arose from the temporary interruption of the voyage, and a charge for salvage, which the underwriter had offered to pay. The cargo had been delivered to the freighters, who had paid freight for the same. An action having been brought, in which the assured claimed as for a total loss, it was holden, that in cases of insurance, the plaintiff's demand is for an indemnity, consequently his action must be founded upon the nature of the injury sustained at the time of action brought; that, as it was repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event had decided that the real injury was an average loss only, the plaintiff, in the present case, was entitled to recover for an average loss only. At the conclusion of the judgment, Lord Mansfield said, that the court desired it to be understood that the only point determined was, "that on a valued policy, the plaintiff could not recover more than the actual loss, which had happened at the time when he chose to abandon."

A late decision on this subject, and which was admitted to be new in specie, must not pass unnoticed. The defendant had subscribed two policies, one on ship, and the other on freight of the same ship, on a voyage from Liverpool to Jamaica. The ship was captured on the 21st of September, and recaptured on the 25th; after which, the plaintiff having received intelligence on the 30th of the capture, but not of the recapture, gave notice of abandonment on the 31st, which he persevered in after the 6th of October, when news of the recapture arrived, and that the ship was safe in a port in Ireland, but which notice the underwriters did not accept. And it appeared, that instead of a total loss, there had been only a small partial loss of 13*l.* and a fraction, for salvage and charges on the policy on freight, and 15*l.* and a fraction on the ship and policy, and that no damage whatever was sustained by the ship in the possession of the enemy. The question was, whether that which in the result turned out to be only a partial loss to a trifling extent should, because of the notice of abandonment given when a total loss appeared to exist, be recovered as a total loss. The court were of opinion, that they must look to the real nature of the contract in a policy of insurance,

which was nothing more than a contract of indemnity, and, consequently, as that which was supposed to be a total loss at the time of the notice of abandonment first given had ceased; and as only a small loss had been incurred in the salvage, that was the real amount of the indemnification which the plaintiff was entitled to receive under this contract of indemnity. Lord Ellenborough observed, "that it has been said in argument, that the offer to abandon having been rightly made at the time, a right of action vested in the assured, which could not be defeated by the subsequent events; but that proposition is not only not true in the whole, but it is not true in its parts. The effect of an offer to abandon is truly this, that if the offer appear to have been properly made upon certain supposed facts which turn out to be true, the assured has put himself in a condition to insist upon his abandonment; but it is not enough that it was properly made upon facts, which were supposed to exist at the time, if it turn out that no such facts existed, or that other circumstances had occurred which did not justify such abandonment. It may be said to be properly made upon notice received, and *bona fide* credited, by an assured, of his ship having been wrecked, whether such intelligence were true or not, and though the letter conveying it turned out to be a forgery: and yet, clearly no right of action would vest in him, founded upon an abandonment made upon false intelligence, and without any thing, in fact, to warrant the giving of such notice. What is an abandonment more than this, that the assured having had notice of circumstances, which, if true, entitle him to treat the adventure as a total loss, he, in contemplation of those circumstances, casts a desperate risk on the underwriter, who is to save himself as well as he can? But does not all this presume the existence of those facts on which the right accrues to him to call upon the underwriter for an indemnity? And if they be all imaginary, or founded in misconception, or if at the time it had ceased to be a total loss, and there be no damage to the assured, or at least if the only damnification arise out of the very act (the recapture) which saves the thing insured from sustaining a total loss, the whole foundation of the abandonment fails."

The loss of the voyage occasioned by the detention of the ship will not enable the owner to recover upon a policy on the ship as for a total loss, the ship having been released before abandonment*.

Upon a hostile embargo in a foreign port^f, the ship-owner, who had separately insured ship and freight, abandoned them to the respective underwriters at the same time; the abandonment was accepted by the underwriters; afterwards the embargo was taken off, and the ship completed her voyage and earned freight. The freight having been paid by the freighters to the underwriters on the ship, the ship-owner, the assured, brought an action against one of the underwriters on freight, claiming as for a total loss; it was holden, that the assured could not recover, the freight having been in fact earned; or supposing it to have been in any other sense lost to the assured, by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment, with which, and the consequences thereof, the underwriters on freight had not any concern.

Policy on fruit from Cadiz to London, with the usual memorandum^g. In the course of the voyage the fruit was so much damaged by sea-water that it became rotten and stunk, and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also, being too much damaged to proceed on her voyage, was sold, and the cargo necessarily thrown overboard. It was holden, on a case reserved, that the assured were entitled to recover for a total loss; and *Chambre J.* said "the ship is expressed to have been so much damaged that she could not proceed, but was sold; now this must certainly have made a complete end of the voyage. We do not construe special cases so strictly as we do special verdicts; on the whole, therefore, it seems to be that the loss was total, and though the cargo might be said to exist in specie, yet in value it did not exist at all. If that be so, the inference of law is plain. What is it against which the underwriters protect themselves by the memorandum? Against partial damage. For what reason? Because, as the commodities enumerated are perishable in their nature, it might be impossible to ascertain, with exactness, what part of the loss arose from the nature of the commodity, and what from sea damage. If ever there was a case of total loss, it certainly is the present."

After satisfaction made as to the goods themselves^h, if restored in specie, or compensation made for them, the as-

^f *M'Carthy v. Abel*, 5 East, 388.

^h *Randall v. Cockran*, 1 Ves. 98.

^g *Dyson v. Rowcroft*, 3 Bos. & Pul. 474.

sured stands as a trustee for the insurer, in proportion for what he has paid.

A ship-owner having chartered his ship to J. S.ⁱ insured the ship and freight with different sets of underwriters. Having notice of an embargo laid on the ship in a foreign port, he abandoned the ship and freight to the respective underwriters, and received the whole amount of their subscriptions as for a total loss; first undertaking, by a memorandum on the ship policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it; and afterwards undertaking, by a similar memorandum on the freight policy, to assign to the underwriters on freight all right of recovery, compensation, &c. The ship having been afterwards liberated, returned home, and earned freight, which was received by the assured; it was holden, that however the question of priority as to the title to the freight might have been, as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate in favour of the underwriters on the ship (32), yet that the assured, who had received the freight, was at all events liable on his express undertaking to pay it over to the underwriters on freight. But in a subsequent case^k, which arose on the same embargo, it was holden, that although the underwriter on freight was entitled to recover the freight received by the assured, yet the assured might deduct out of it the following expenses: 1. The expenses of ship and crew in the foreign port, including port charges, (besides the expenses of shipping the cargo, which exclusively belonged to the underwriters on freight). 2. Insurance thereon. 3. Wages and provisions of crew from their liberation in the foreign port till their discharge here. 4. Wages (provisions were supplied by the foreign government) to the crew during their detention. But it was further holden, that the assured was

ⁱ *Thompson v. Rowcroft*, 4 East R. ^k *Sharp v. Gladstone*, 7 East, 24.

^{34.} See also *Leatham v. Terry*,

³ Bos. & Pul. 479.

(32) See *Sharp v. Gladstone*, 7 East, 30. where Lord Ellenborough C. J. observed, that as to the general question, whether an abandonment could be made to the underwriters on freight after an abandonment to the underwriters on ship, he desired to be understood as giving no opinion. He observed also, that upon this question there might be a distinction between the case of a chartered and the case of a *seeking* ship.

not entitled to deduct out of such freight: 1. Charges paid at the port of discharge on ship and cargo. 2. Insurance on ship. 3. Diminution in value of ship and tackle by wear and tear on the voyage home.

In case of a total loss, where the policy is a valued policy, the value inserted in the policy must be paid by the underwriter.

Goods protected by a valued policy, being captured, are condemned as lawful prize, the captors paying freight. The assured may recover as for a total loss¹.

Where the subject matter of the insurance is at first of the value mentioned in the policy, and there is not any imputation of fraud, the underwriter will be bound, in case of a loss, by the valuation in the policy, although the loss happens at the latter end of the voyage, at which time the property insured is considerably diminished in value: as where an insurance was made on a ship², stores, and provisions, valued at and for a certain voyage, and the ship foundered on her arrival at the port of discharge; it was holden, that the loss being total, and no fraud, the underwriter was liable to pay the value inserted in the policy, although it appeared that provisions to the amount of half that value had been expended (33).

In an action upon a valued policy, the defendant paid into court 30% per cent. It was contended, that as the contract admitted the value, and as the payment of money into court admitted the contract, the defendant had made an admission, which furnished at least a *prima facie* case for the plaintiff, of a total loss to the amount insured, and that it was incumbent on the defendant to shew that the loss was less than the whole value in the policy. But the court were unanimous, that the defendants rule was merely an admission that a loss of 30% per cent had been sustained and no more³.

Where there is not any valuation in the policy, the prime cost, or invoice price, together with all charges until the goods are put on board, and the premium of insurance, will

¹ Marshall v. Parker, 2 Camp. N. P. C. n Rucker v. Palsgrave, 1 Taunt. K. 69.
² Shawe v. Fenton, 2 East, 109.
 419.

(33) "Valuation at the sum insured is an estoppel in case of a total loss." Per Lee C. J. in Erasmus v. Bank, M. 21 G. 2. and Smith v. Flexney, Dec. 13, 1747.

be the foundation upon which the loss shall be computed. If part of a cargo, capable of distinct valuation, be lost, the value of such part must be paid.

VI. Of *partial Losses*.

A partial loss upon a ship or goods^a, is such a proportion of the prime cost as is equal to the diminution in value occasioned by the damage.

In the case of a partial loss^b, although the policy be a valued policy, yet the computation must be by the real interest of the assured on board, and not by the value in the policy; that is, the policy, notwithstanding the valuation, must be considered as an open policy.

In the case of a partial loss upon goods, by sea damage, the rule is, that the underwriter is not to be subjected to the fluctuation of the market^c, and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. Hence, in computing the average in a case of this kind, the difference between the respective gross proceeds (34) of the damaged goods, and of the goods if they had arrived sound *at the port of delivery*, must first be ascertained. Then, whatever aliquot part of the gross proceeds of the sound commodity at the port of delivery such difference constitutes, the same aliquot part of the original value will be the sum for which the underwriter will be liable: *e. g.* Suppose a hogshead of sugar is insured on a voyage from London to Hamburgh: the original value is 30%; being deteriorated by sea damage, the gross proceeds at Hamburgh amount to 40%. whereas, if the sugar had not been damaged, the gross proceeds would have amounted to 50%. The difference is 10% or one fifth part of 50%. The sum then which the underwriter must pay, will be one-fifth

^a Marsh. 535.

^q Lewis v. Rucker, 2 Burr. 1167.

^p Le Gras v. Hughes, Marsh. 541.

(34) It was solemnly determined in *Johnson v. Sheddon*, 2 East, 581. recognised in *Hurry v. Royal Ex. Ass.* 3 Bos. & Pul. 308. that the gross proceeds, and not the net proceeds must be taken as the basis of the calculation.

of 30% the original value, or 6%. In cases where the sums are more complicated than in the preceding instance, the calculation may be made as follows: as the gross proceeds of the sound : the gross proceeds of the damaged : : the original value : a fourth quantity, which being found by the rule of three, must be subtracted from the prime cost, and the difference will be the average loss, or sum for which the underwriter is chargeable.

The proportion of loss is calculated through the same medium (that is, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery) whether the policy be valued^r or open^t. But the proportion of loss, when ascertained, is applied to different standards of value. For the original value in the case of a valued policy is the valuation in the policy; but in the case of an open policy, the original value is the invoice price at the port of delivery, including premiums of insurance and commission.

VII. Of Adjustment.

THE adjustment of a loss is the settling and ascertaining the amount of the indemnity which the assured^t, after all allowances and deductions are made, is entitled to receive under the policy, and fixing the proportion which each underwriter is liable to pay.

An adjustment being endorsed on the policy, and signed by the underwriter, with a promise to pay in a given time, is to be considered as a note of hand^a, but it does not require a stamp^x. If the underwriter refuses to pay, the assured may declare on the policy, and give the adjustment in evidence (proving the signature) as an admission of all the facts necessary to be proved. It is not necessary, although usual at this day, to declare specially on the adjustment^y. The^z adjustment is only *primâ facie*, and not conclusive, evidence against the underwriter.

Hence where the witness^a, who proved the adjustment;

^r Lewis v. Racker, 2 Burr. 1167.

^s Usher v. Noble, 12 East, 639.

^t Marsh. 529.

^u Hog v. Gouldney, Beawes, 310. Lee C. J.

^x Per Kenyon C. J. in Wiebe v. Simp-

son, London Sittings after M. T.

41 G. 3. MSS.

^y Per Kenyon C. J. in Rodgers v. Maylor, Park, 118.

^z S. C.

^a De Garron v. Galbraith, Park, 118.

swore that soon after the underwriters had signed it, doubts arose in their minds as to the honesty of the transaction, Lord Kenyon C. J. was of opinion, that in such case the plaintiff should produce other evidence, and that shutting the door against inquiry, after an adjustment, would be putting a stop to candour and fair dealing amongst the underwriters. The court afterwards, on a motion for a new trial concurred in opinion with the chief justice.

Case upon a policy of insurance upon the ship *Valiant*^b, and goods, "from London to Leghorn and Naples, or Naples and Leghorn, both or either, with permission to join convoy in the Channel and to call at Gibraltar." The plaintiff declared for a total loss by perils of the sea. A broker, called on the part of the plaintiff, said, that he had effected the policy, and that it had been subscribed by one M'Clery, as the defendant's agent. That after the loss there was laid before the agent a translation of all the papers which had come to his (the broker's) hands, and that the agent might have examined them if he pleased, and that he signed the adjustment. It was then proposed to call M'Clery, but Erskine objected to it on the ground that he was an interested witness. Kenyon C. J. over-ruled the objection, observing, that however his concern in the transaction might operate on his feelings and affect his credit, he did not think he had such an interest as to render him incompetent. M'Clery was then called, who said, that he read the protest in a cursory manner, and that, when he came to the average, observing the accounts to be correct, and not then knowing what he had learned afterwards, viz. that some vitriol had been stowed in an improper part of the ship, he signed the adjustment.—Kenyon C. J. "When I first came into this court, I was told that an adjustment was conclusive evidence against a defendant. My mind revolted at this proposition, and I then went to the extent, *und perhaps I have gone far enough*, of saying, that if there had been any fraud practised, or if there had been any misconception of the law or fact upon which the adjustment had been made, the underwriter should not be absolutely concluded by it; but can I say in this case, that a merchant of the city of London, when papers were laid before him, and he had an opportunity of examining them, signed the adjustment *inconsiderately*?" Verdict for the plaintiff.—N. The defendant was not prepared to prove, that the vitriol had been improperly stowed.

^b *Voller and another v Griffiths*, London Sittings after M. T. 41 G. 3. B. R. Kenyon C. J. MSS.

See *Christian v. Combe*, 2 Esp. N. P. C. 489. to the same effect.

Since these decisions, a case has occurred, viz. *Herbert v. Champion*, 1 Camp. N. P. C. 134, in which Lord Ellenborough has expressed a clear opinion, that an adjustment is merely an admission on the supposition of the truth of certain facts stated, that the assured are entitled to recover; and although it is incumbent on an underwriter, who has once admitted his liability by an adjustment, to make out a strong case, yet, until actual payment of the money, he may avail himself of any defence, which either the facts or the law of the case will furnish.

In *Shepherd v. Chewter*, 1 Camp. N. P. C. 274. it was holden that an adjustment was not binding, although the underwriter, at the time of signing it, had an opportunity of becoming acquainted with the history of the voyage, and the circumstances attending the loss, his attention not having been drawn to the fact which discharged his liability to the assured; Lord Ellenborough C. J. observing, that the adjustment was *prima facie* evidence against the defendant, but it certainly did not bind him, *unless there was a full disclosure of the circumstances of the case; unless they were all blazoned to him as they really existed.* But see Mr. Campbell's note on this case, in which he has shewn, that, upon principles of law, a mere adjustment is not in any case, or under any circumstances, conclusive, and that the utmost effect which can be given to it, is to transfer the burthen of proof from the assured to the underwriters. The doctrine laid down by Lord Ellenborough, in *Herbert v. Champion*, certainly supports the argument of Mr. Campbell: but the expressions used by his lordship in *Shepherd v. Chewter*, seem to re-establish the opinion delivered by Lord Kenyon in *Voller v. Griffiths*, and *Christian v. Combe*. It is to be lamented that on a subject of so much importance, hitherto, there has not been one solemn decision, and that the law relating to the operation and effect of an adjustment, is still to be gleaned from the fluctuating opinions of three or four judges sitting at Nisi Prius.

VIII. *Of the Remedy by Action for Breach of the Contract of Insurance, and herein of the Declaration—Pleadings—Consolidation Rule.*

The usual remedy or form of action against the insurers or underwriters, to recover a loss upon a policy of insurance, is an action on the case, founded upon the express special undertaking of the insurers who have signed the policy, or (as it is technically called) a special assumpsit, adding a general indebitatus assumpsit with the usual money counts, as they may become necessary, in case the policy should be considered as void, and the assured entitled to recover the premium.

The policy must be stated in the declaration, and it must be alleged, that it was signed or subscribed with the name of the insurers against whom the action is brought; that in consideration that the assured had paid to the defendant the premium, the defendant had undertaken to indemnify the assured against the losses specified in the policy; that the goods, wares, and merchandizes, were laden on board the ship to the amount of £ (i. e. the value insured) (35); and further it must be alleged, that the plaintiffs were interested (36) therein, unless the insurance be on a foreign

(35) In an action on a policy of insurance on indigo and bale goods, after setting out the policy, it was averred in the declaration, that *divers goods* were loaded on board, and that the policy was made on the *said goods*; on special demurrer, because it was not averred, that the goods stated to have been loaded on board were indigo or bale goods, the court observed, that the allegation in the declaration, that the policy was made on the goods put on board, completely answered the objection taken, since that could not be true, unless indigo or bale goods were loaded on board, which it would be necessary for the plaintiff to prove at the trial. *De Symons v. Johnston*, 2 Bos. & Pul. N. R. 77.

(36) It is immaterial to aver interest at any day previous to the commencement of the risk. In a declaration on a policy on freight, if it be averred, that the plaintiff was interested at the time of the ship's sailing, or that the policy was made on a certain day, and that afterwards on a subsequent day the plaintiff acquired an interest, it will suffice. *Per Cur. Rhind v. Wilkinson*, 2 Taunt. 242, 3.

ship, in which case an averment of interest is not necessary (37). The declaration then proceeds to state, that the property insured was lost, and by what means it was lost, so as to bring the case within some or one of the perils specified in the policy, and thereby intended to be insured against; as by the barratry of the master or mariners, &c.

If the plaintiff should allege in the declaration, that there was a total loss, and lay his damages accordingly, evidence of a partial loss will maintain the declaration, and plaintiff may recover the amount of his real loss.

The two insurance companies, namely, the Royal Exchange and the London Assurance, having been in conse-

c 2 Burr. 904. 1 Bl. R. 198.

(37) Whether, in such case, it may be necessary that any allegation as to the property of the ship should be made on the part of the plaintiff, or whether it be not incumbent on the defendant to shew that the property is not insurable within the statute 19 G. 2. c. 37. s. 1. is a question which has not been solemnly decided. In several cases, where actions have been brought on foreign ships, averments as to the property have been inserted in the declaration. In *Craufurd v. Hunter*, 8 T. R. 15. it was averred, that the ship insured were not belonging to his Majesty, or any of his subjects, *before or at the time of making the policy, or at the time of the loss.* In *Nantes v. Thompson*, 2 East, 385. the averment was, "that the ship was not at the time of effecting the policy, nor of the happening of the loss, *nor at any other time*, the property of the king, or any of his subjects." In neither of these cases was any objection made to the form of the averments; but in *Kellner v. Le Mesurier*, 4 East, 396. (where an insurance was made in England on the ship *Princess Louisa*, lost or not lost, "at and from Lisbon to Cadiz, &c.") the averment being that the ship was not at the time of making the policy, nor of the happening of the loss, the property of the king, or any of his subjects, there was a special demurrer, assigning for cause, that the declaration did not contain any averment of interest, and that it did not appear that the ship, at the time of her departing from Lisbon, or at the beginning of the adventure insured, was not the property of the king, or any of his subjects. It was contended, on the part of the plaintiff, that supposing the allegation in question to be insufficient, yet it might be rejected as surplusage, for it was not necessary to make any allegation at all on the subject, and that the onus lay on the defendant to shew, that the property was not insurable in virtue of the provisions introduced by the statute 19 G. 2. c. 37. s. 1. The court being of opinion in favour of the defendant, on another ground of objection, declined the consideration of the question as to the averment.

quence of the stat. 6 G. 1. c. 18. incorporated by several charters granted, and having a common seal affixed to all their contracts, the proceeding against these companies must be by action of debt or covenant.

If there has been a double insurance (38), then it will be proper to consider against which of the underwriters (as the best man, or in the best circumstances) the action shall be brought.

Of the Pleadings.

The action of assumpsit being that form of action which is most usually brought upon policies of assurance, the defendant may of course plead any plea which the law permits to be pleaded to that action; but as the grounds of defence, which are most usually insisted on by the insurers, go to the disaffirmance of the contract, and consequently may be given in evidence under the general issue, non assumpsit, it rarely happens that any other plea is pleaded. This plea puts in issue every material allegation in the declaration.

The actions of debt and covenant (which are the only forms of action which can be adopted in cases where the two insurance companies are defendants) not admitting by the rules of the common law of any plea like non-assumpsit, which will put in issue the whole declaration, (for *non est factum* only puts in issue the due execution of the deed declared on,) it has been expressly provided by stat. 11 G. 1. c. 30. s. 43. "that in all actions of debt against either of the said corporations, or upon any policies of insurance

(38) Double insurance is, where there are two insurances made by the same person on the same risk, whereby the *assured* proposes to receive the same sum twice for the same loss, or, in other words, a double satisfaction. The policy of the law, however, will permit the recovery of a single satisfaction only. But although the insured is not entitled to two satisfactions, yet in an action upon the first policy, he may recover the whole sum insured*. Whether in such case the first insurers may recover a rateable satisfaction from the other insurers seems to be a *veraxa questio*†. See further on the subject of double insurance, *Godin v. London Assurance*, 1 Burr. 489. 1 Bl. R. 103.

* *Newby v. Read*, 1 Bl. R. 416.

† *Aff. Newby v. Read*, *ubi sup.* *Rogers v. Davis*, *Beawes*, 342. *Davis v. Gildart*, all decided at N. P. by Ld. Mansfield. *Neg. African Comp. v. Bull*, 1 Show. 132.

under their common seal, it shall be lawful for them to plead generally, that they owed nothing to the plaintiff in such action; and in actions of covenant upon such policies to plead generally, that they have not broke the covenants in such policy contained, or any of them. And if issue be joined thereupon, it shall be lawful for the jury, if they see cause, to find a verdict for the plaintiff, and to give such part only of the sum demanded, if in debt, or so much damages, if in covenant, as it shall appear to them, upon the evidence, such plaintiff ought in justice to have."

Consolidation Rule.

In actions upon a policy of assurance against several underwriters^a, the court, by consent of the plaintiff, will make a rule, on the application of the defendants, which is called the consolidation rule, for staying the proceedings in all the actions except one, upon the defendant's undertaking to be bound by the verdict in that action, and to pay the amount of their several subscriptions and costs, in case a verdict shall be given therein for the plaintiff. This rule, though attempted before without success, was introduced by Lord Mansfield into general use, to avoid the expense and delay arising from the trial of a multiplicity of actions upon the same question; and if the plaintiff will not give his consent, the court have the power of granting imparlances in all the actions but one, till the plaintiff has an opportunity of proceeding to trial in that action. On the other hand, if the plaintiff consent to the rule, the court will make the defendants submit to reasonable terms, such as admitting the policy, producing and giving copies of books and papers, and undertaking not to file a bill in equity, or bring a writ of error.

The plaintiff having brought actions against the defendant, and several other underwriters, upon a policy of insurance^c, a consolidation rule was obtained, by which it was ordered that the several parties should be bound by the verdict to be given in a cause of *Aylwin v. Wylie*. That cause having been tried, and a verdict found for the plaintiff, the defendant brought a writ of error; but, having omitted to put in bail in error, within due time, the plaintiff took out execution. The defendant in the present action then brought a writ of error, and put in bail, notwithstanding

^a Tidd's Prac. p. 592, 2d. ed. 557. ^c *Aylwin v. Favins*, 2 N. R. 400. ed. 3d.

which the plaintiff moved for leave to sue out execution against him. The court refused the application, Sir J. Mansfield observing, that the form of the consolidation rule decided this motion, which was, that the proceedings in the several causes should be stayed, and that the parties should be bound by the verdict to be given in the cause of *Aylwin v. Wylie*, if that should be to the satisfaction of the judge and the court. How then could the court say, that this rule deprived the defendants, in any of the actions, from bringing writs of error? It was admitted that, in the action tried, the defendant was entitled to bring a writ of error. Then why should the other defendants be precluded? It was contended, however, that as the defendant in the action tried had been prevented, by a blunder, from rendering his writ of error effectual, that blunder should affect the other defendants. But there was nothing in the rule to authorize that position; the order related solely to the verdict.

IX. *Of the several Grounds of Defence on which the Insurer may insist :*

1. *Illegal Voyage or illegal Commerce.*

2. *Misrepresentation.*

3. *Breach of Warranty,*

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|---------|---|--|
| Express | { | 1. <i>Time of sailing.</i> |
| | | 2. <i>Safety of a Ship at a particular Time.</i> |
| | | 3. <i>To depart with Convoy.</i> |
| | | 4. <i>Neutral Property.</i> |
| Implied | { | 1. <i>Not to deviate.</i> |
| | | 2. <i>Seaworthiness.</i> |

4. *Re-assurance.*

5. *Wager Policy.*

1. *Illegal Voyage, or illegal Commerce.*

ONE ground of defence is, that the voyage insured was prohibited by law, or that the goods insured were intended for carrying on an illegal commerce. In neither of these

cases can an action be supported against the underwriter for non-performance of the contract of insurance.

The circumstance of the underwriter having been apprized of the illegality of the voyage or trade is wholly immaterial, but, in order to render the insurance illegal, it is necessary that the illegality should exist during the course of the voyage insured. Hence a policy on goods purchased with the proceeds of an illegal cargo is binding^f; and in like manner the assured may recover on a policy, although the ship in a prior voyage had been guilty of some transgression for which she was liable to be seized^g.

Trading with an enemy^h, without the king's licence, being illegal, the law will not enforce a contract of insurance made for the protection of such trade. But it is legal to trade with the subjects of an enemy's country by the king's licenceⁱ. If it be provided in such licence, that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond having been given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient, that the goods were shipped before the expiration of the time, the ship not sailing until after that time.

Trading to the East Indies, in contravention of the stat. 9 & 10 W. 3. c. 44. (whereby a monopoly is vested in the East India Company), is illegal, and consequently policies on ships engaged in such trading are void^k.

Whenever the crown, for purposes of state policy and public advantage, licenses a description of trading with an enemy's country, which would otherwise be unquestionably illegal, such commerce must be regarded by all the subjects of the realm and by the courts of law as legal, with all the consequences of its being legal; one of which consequences is a right to contract with other subjects of the country for the protection of such property in the course of its conveyance to its licensed place of destination though an enemy's country, and for the purpose of being there delivered to an alien enemy as consignee or purchaser^l.

^f Bird v. Appleton, 8 T. R. 562.

^g S. C.

^h Potts v. Bell, 8 T. R. 548.

ⁱ Vandyck v. Whitmore, 1 East, 475.

^k Camden v. Anderson, 6 T. R. 793.

Affirmed on error in Exch. Chr. 1

Bos. & Pul. 272.

^l Usparicha v. Noble, 13 East, 332.

A. a Spaniard, by birth^m, who had been domiciled as a merchant in England for several years, having purchased and shipped goods in a neutral vessel on account of a correspondent, a native of, and resident in Spain, obtained a license from the British government for the vessel to proceed with her cargo on a voyage from an English port to a port in Spain. A. effected a policy on the goods, which was in the usual form, and stated to be made by A. "as well in his own name as in the name of any person to whom the same might appertain." The vessel in the prosecution of the voyage was captured by a French privateer, and carried into a port in Spain, where the vessel and cargo were condemned. At the time of the capture and condemnation, France and Spain were co-belligerent allies at war with England. A. having brought an action on the policy, averring interest in the purchaser, it was holden, that A. was entitled to recover, and that the action was well brought in his name for the benefit of the purchaser; that the legal result of the license was, that not only the plaintiff, the person licensed, might sue in respect of such licensed commerce in an English court of law, but that the commerce itself was to be regarded as legalized for all purposes of its due and effectual prosecution. That for the purpose of the licensed act of trading (but to that extent only) the person licensed was to be considered as virtually an adopted subject of this country, and his trading, as far as the disabilities arising out of a state of war were concerned, was British trading; that the plaintiff and the Spanish purchaser of the cargo were actually privy to the objects of the British government, and acting in furtherance thereof, and in direct opposition to the laws and policy of their own country, and that it could not be contended to be illegal to insure a trade carried on in contravention of the laws of a state at war with us, and in furtherance of the policy of our country and its trade, and which this trade in question, sanctioned as it was by his majesty's license, must be deemed to have been.

In *Mennett v. Bonham*, and *Flindt v. Crockatt*, which were argued in B. R. E. T. 52 Geo. 3. the authority of the preceding decision appears to have been doubted. These latter cases are to be reviewed in a Court of Error.

By virtue of a treaty of commerce entered into between Great Britain and the United States of America.

(39), the citizens of the United States may carry on trade between the British territories in the East Indies and the United States, in articles not entirely prohibited. It is not necessary, that this trade should be a direct and immediate trade from the United States to the British territories^a; it may be carried on circuitously through any country in Europe, including Great Britain. A natural-born subject of Great Britain, admitted a citizen of the United States of America, either before or after the declaration of American independence, has been considered as a citizen of the United States, within the meaning of the above-mentioned treaty, and as such entitled to the commercial privileges thereby granted. Hence a policy of insurance, effected by or in favour of such adopted citizen of the United States, for the protection of such circuitous trade, is valid.

Although insurances upon goods, the exportation or importation of which is prohibited by the law of England, or by the law of nations, be illegal, yet where the prohibition is founded merely on the law of a foreign state, the insurance will be valid; because one nation never takes notice of the revenue laws of another^b.

The mere circumstance of an alien^c residing in an enemy's country will not invalidate an insurance effected by him on goods to be delivered at a neutral or friendly port.

Where a particular trade is prohibited by express statute, insurances made for the protection of such trade are illegal^d.

Trading in contravention of a proclamation, whereby an embargo is laid on, in time of war, is illegal; and consequently an insurance upon such trade, even when carried on by a neutral^e, is void.

If there be an infirmity in any part of an integral voyage, it will make the whole illegal, so that the insured cannot

^a *Wilson v. Marryat*, 8 T. R. 31. ^p *Bromley v. Heselstine*, 1 Camp. N. 411.
^b *affirmed on error in the Excheq. Ch.* P. C. 78.
^c *1 Bos. & Pul. 430.* ^q *Johnston v. Sutton*, Doug. 254.
^d *Planché v. Fletcher*, Doug. 250. ^r *Delmada v. Motteux*, Park, 254.

(39) This treaty was entered into on the 19th of November, 1794, ratified by the United States on the 14th of August, 1796, and by his Majesty on the 28th of October in that year, and retrospectively confirmed by parliament. See stat. 37 Geo. 3. c. 97. The articles of this treaty, relating to the subject now under consideration, will be found in a note to the report of *Wilson v. Marryat*, 8 T. R. 35.

recover upon a policy on any part of it^a. If a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void.

A policy was effected on goods to be thereafter specified to a certain amount^b; by the specification it appeared that the goods consisted principally of hardware, but partly of naval stores, the exportation of which was prohibited, under pain of forfeiting the stores, treble their value and the ship. It was holden, that the exportation of the stores being illegal, all contracts for protecting the stores so exported were impliedly avoided; that the policy was one entire contract on goods to be thereafter specified, to which the underwriters subscribed; and the subsequent specification by the assured could not alter the nature of the contract with respect to the underwriters, so as to sever that which was originally one entire contract.

2. *Misrepresentation, Concealment, and Suppression.*

The allegation of a falsehood^a or misrepresentation, (though by mistake^x) or the concealment and suppression^y of the truth, *as to a fact or circumstance material to the risk*, either by the assured or his agent^z, is considered as a fraud on the underwriter, and consequently will vacate the policy or annul the contract from the beginning. Hence the underwriter may avail himself of this ground of defence, even where the loss arises from a cause wholly unconnected with the fact or circumstance misrepresented^a.

Goods were insured as the goods of a Hamburger, who was an ally, and the goods were, in fact, the goods of a Frenchman, who was an enemy; this was holden by Holt C. J. to be a fraud^b.

So where a letter had been received^c, stating that a ship sailed on the 24th of November, after which an insurance

^a Admitted by Ld. Kenyon C. J. in *Wilson v. Marryat*, 8 T. R. 46. and expressly laid down by the same learned judge in his charge to the jury, in *Bird v. Pigou*, London Sitings after H. T. 40 G. 3. B. R. MSS.

^t *Parkin v. Dick*, 2 Camp. N. P. C. 321. 11 East, 502. S. C.

^u *Skinn*. 327. *Roberts v. Fonnereau*, Park, 176.

^x *Macdowall v. Fraser*, Doug. 260.

^y *De Costa v. Scandret*, 2 P. Wms. 170. *Hodgson v. Richardson*, 1 Bl. R. 463. *Ratcliffe v. Shoolbred*, Park, 180. *Willes v. Glover*, 1 Bos. & Pul. N. R. 14.

^z *Fitzherbert v. Mather*, 1 T. R. 12.

^a Per Lee C. J. in *Seaman v. Fonnereau*, Str. 1183.

^b *Skin*. 327.

^c *Roberts v. Fonnereau*, London Sitings after Trin. 1742. Park, 176.

was made, and the agent of the assured told the insurer, that the ship sailed the latter end of December; this was holden by Lee C. J. to be a fraud.

So where a ship was insured in London, on the 30th of January⁴, on a voyage from New York to Philadelphia, and the broker represented the ship to be safe in the Delaware, on the 11th of December, whereas in fact it was lost in that river on the 9th of December; it was holden, that as the representation was false in point of fact, and as it related to a material circumstance, namely, the safety of the ship at a certain time, the contract was annulled; and although it appeared that the assured, at the time, believed the representation to be true, yet the court were of opinion that this did not vary the case; for it was incumbent on the assured to make a fair and true representation, and if he represented material facts to the underwriter, without knowing the truth, he took the risk on himself (40).

The same rule holds⁵, where the misrepresentation is

⁴ *Macdowall v. Fraser*, Doug. 260. ⁵ *Fitzherbert v. Mather*, 1 T. R. 12.
See also *Stewart v. Dunlop*, 4 Bro.
P. C. 403. Tomlin's ed.

(40) It was said by Lord Mansfield, in *Barber v. Fletcher*, Doug. 306. that it had been determined, in a variety of cases*, that a representation to the first underwriter extended to the others. "By an extension of an equitable relief, in cases of fraud, if a man is a knave with respect to the first underwriter, and makes a false representation to him in a point that is material, as where, having notice of a ship being lost, he says she was safe, that shall affect the policy with regard to all the subsequent underwriters who are presumed to follow the first." Per Lord Mansfield C. J. in *Pawson v. Watson*, Cowp. 789. Agreeably to this doctrine, the Court of King's Bench, in a recent case of *Marsden v. Reid*, 3 East, 573. intimated an opinion, that where it appears that a material fact has been represented to the first underwriter, to induce him to subscribe the policy, it shall be taken to be made to all the rest without the necessity of repeating it to each†. A representation made by an insurance broker, when the names of the underwriters are put upon a slip, is binding on the assured, unless there is evidence of its being altered or withdrawn between that time and the execution of the policy. *Edwards v. Footner*, 1 Camp. N. P. C. 530.

* Q. if there be any in the printed books?

† But a representation made to any underwriter, except the first, is not to be considered as made to subsequent underwriters. *Bell v. Carstairs*, 2 Camp. N. P. C. 543.

made by the proper agent of the assured, although the assured be not guilty of any improper conduct; for the act of the agent binds the principal, and it will be presumed, that the principal knows whatever the agent knows.

In a case where the word *expected* was used, as that the vessel insured was *expected* to set sail at such a time, this was holden not to amount to a representation^f.

A representation, as it does not form any part of the written policy, requires only to be *substantially* performed. It is distinguishable in this respect from a warranty, which being part of the policy, must be *strictly* performed.

A merchant having received intelligence^g that a ship described like his was taken, insured her, without giving any information to the insurers of what he had heard; it was holden, that the concealment was a fraud on the underwriters.

So where in an action on a policy of insurance of a ship on a voyage from Lisbon to London^h, it appeared that the plaintiff had, on the 24th of November, received information of the ship having sailed on the 8th; it appeared also, that another vessel, which had sailed at the same time with the ship insured, had arrived in safety; after which, viz. on the 2d of December, the plaintiff had effected the insurance in question, without making any disclosure to the underwriter; it was holden, that there was a concealment of circumstances sufficient to avoid the policy.

In an action on a policy of insuranceⁱ, on goods on board the ship W. from Berderygge to London, it appeared that the shippers, on the 30th of November, 1802, wrote to the plaintiffs, who were the consignees, in these words, "I think the captain will sail to-morrow; but should he not be arrived in your port, you will be so kind as to make the insurance as low as you possibly can, for my account." This letter having been received by the plaintiffs on the 13th of December, they effected a policy on the next day, without communicating the letter to the underwriters. It was also proved, that it was not the custom for ships to sail from Berderygge to London without a fair wind; that the voyage was often performed in four or five days, and when the weather was not very favourable, in about ten days. The ship W. did not in fact sail until the 24th of December.

^f *Barber v. Fletcher*, Doug. 305.

^g *De Costa v. Scandret*, 2 P. Wms. 170.

^h *M'Andrew v. Bell*, 1 Esp. N. P. C. 373.

ⁱ *Willes v. Glover*, 1 Bos. & Ppl. N. R. 14.

The jury found a verdict for the plaintiffs. On a motion for a new trial, it was contended, that as the ship did not sail until ten days after the policy was effected, the risk was in no respect varied by the concealment of the letter; that unless the circumstance concealed would vary the amount of the premium, the concealment would not vitiate the policy; that the expectation of the shipper in this case, which was not realized by the sailing of the ship at the expected time, was not material, and therefore need not be communicated to the underwriters. But Sir J. Mansfield C. J. conceived that the letter was material to be communicated to the underwriters, in order that they might have an opportunity of exercising their judgment in settling the premium. Had it not been for the opinion of the jury, he should not have entertained the least doubt upon the subject. But though great respect was due to their opinion, still he thought their judgment had been too hastily formed, and that the case ought to be reconsidered (41).

"The reason of the rule which obliges the party to disclose^k, is to prevent fraud, and encourage good faith; it is adapted to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reason to suspect." The question, therefore, in cases of this kind is, "Whether there were, under all the circumstances, at the time the policy was underwritten, a fair statement or a concealment, fraudulent, if designed, or, though not designed, varying materially the object of the policy, and changing the risk understood to be run?"

Information respecting the subject matter of warranty, either express or implied, need not be communicated to the underwriter, unless there be a specific request on his part for such information.

Hence in the case of *Shoolbred v. Nutt*, Park, 229. a.

^k Per *Ld. Mansfield C. J.* in *Carter v. Boehm*, 3 Burr. 1905. cited by *Ld. Ellenborough C. J.* delivering judgment in *Haywood v. Rodgers*, 4 East, 596.

(41) The nature of this work will not permit the insertion of all the cases relating to concealment; neither is it necessary, since the reader will perceive that they are cases depending wholly on their own special circumstances. If he is desirous of pursuing the subject, he may peruse the following cases: *Seaman v. Fonereau*, Str. 1183. *Carter v. Boehm*, 3 Burr. 1905. 1 Bl. R. 594. *Webster v. Foster*, 1 Esp. N. P. C. 407. *Littledale v. Dixon*, 1 Bos. & Pal. N. R. 151. *Freeland v. Glover*, 7 East, 457. *Lynch v. Hamilton*, 3 Taunt. 37. *Bell v. Bell*, 2 Camp. N. P. C. 479.

where the owner had received letters from his captain the day before he effected the insurance, stating, that the ship had arrived at Madeira, but was very leaky, and that the pipes of wine had been half covered with water, which letters were not communicated to the underwriters; Lord Mansfield told the jury, "That there should be a representation of every thing relating to the risk which the underwriter has to run, except it be covered by a warranty. It is a condition, or implied warranty, in every policy, that the ship is seaworthy, and therefore there need be no representation of that. If she sail without being so, there is no valid policy. Here the leak was stopped before she sailed from Madeira, and she sailed in good condition from thence, and there is no occasion to state the condition of a ship or cargo at the end of the former voyage." Verdict for plaintiff.

So where in an action on a policy of insurance upon a ship from Trinidad to London¹, it appeared that the assured had received a letter from his captain, informing him that he had been obliged to have a survey on the ship at Trinidad, *on account of her bad character*, but the survey, which accompanied the letter, gave the ship a good character; it was holden, that the concealment of the letter and survey from the underwriter, did not vacate the policy, inasmuch as the assured impliedly warranted the ship to be seaworthy, and it did not appear that he had concealed any circumstance relative to the seaworthiness of the ship, or that at the time of effecting the policy he knew of any fact which rendered her, with reference to the risk, otherwise than sea-worthy.

It will be presumed that the underwriter is acquainted with the usage and circumstances of the branch of trade to which the policy relates^m, and consequently the assured is not bound to make a disclosure thereof; as e. g. upon an insurance on an East India voyage, the underwriters are bound to know the course of the East India Company's charter-parties and trade, and that the ship's destination is liable to be changed after the policy is effectedⁿ. If the usage of the trade is general, it is immaterial for this purpose that it is not uniform^o:

¹ Haywood v. Rodgers, 4 East, 590.

ⁿ Grant v. Paxton, 1 Taunt. 463.

^m Vallance v. Dewar, 1 Camp. N. P. C.

^o See cases in note m.

503. Ongier v. Jennings, ib. 503. n.

Kingston v. Knibbs, ib. 504. n.

3. *Breach of Warranty;*

- | | | |
|---------|---|--|
| Express | { | 1. <i>Time of sailing.</i> |
| | | 2. <i>Safety of Ship at a particular Time.</i> |
| | | 3. <i>To depart with Convoy.</i> |
| | | 4. <i>Neutral Property.</i> |
| Implied | { | 1. <i>Not to deviate.</i> |
| | | 2. <i>Seaworthiness.</i> |

Another ground of defence which may be taken by the underwriter to defeat the action, is the non-compliance with a warranty, either express or implied.

Every warranty incorporated in the body of the policy, or appearing on the face of the instrument, *e. g.* in the margin², or at the bottom of the policy³, or inserted in any print or writing, which is by reference incorporated with the policy⁴, must be *strictly* and *literally* complied with (42); and in this respect it is distinguishable from a mere *representation*, which, if it be *substantially* fulfilled, it is sufficient.

The most usual kinds of warranties, inserted in policies, are, 1. As to the time of sailing. 2. The safety of the ship at a particular time. 3. Departing with convoy. 4. That the thing insured is neutral property.

I shall proceed to consider the nature of these warranties in the preceding order.

Express Warranty. 1. *Time of sailing.*—A ship, which was insured *at and from* Jamaica to London, *warranted to have sailed on or before a particular day*, with a return of premium in case of convoy⁵, *sailed* before the day from the port of her lading, with all her cargo and clearances on

² *Bean v. Stupart*, Doug. 11. *De Hahn v. Hartley*, 1 T. R. 343.
³ 3 T. R. 360.
⁴ *Worsley v. Wood*, 6 T. R. 710. *Routledge v. Burrell*, 1 H. Bl. 254.
⁵ *Bond v. Nutt*, Cowp. 601.

(42) "A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is not any contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist, unless it be *literally* complied with." Per Lord Mansfield C. J. 1 T. R. 345, 6. "The very meaning of a warranty is to preclude all questions, whether it has been *substantially* complied with; it must be *literally* so." Per Ashhurst J. 1 T. R. 346.

board, to the usual place of rendezvous at another part of the island, in order to join the convoy which then lay ready, where she arrived in safety, but was detained there by an embargo *beyond* the day. It was holden, that although the place of rendezvous was out of the direct course of the voyage, yet, as the ship, when she sailed from the port of lading, had not any view or object but to make the best of her way to England, and as she did not go to the place of rendezvous for any purpose independent of the immediate prosecution of her voyage, the voyage began from the port of lading, and consequently the warranty had been complied with.

A French ship was insured "at and from Guadaloupe to Havre'," warranted to sail on or before a particular day. The ship took in her compleat lading, and all her clearances, at Point-a-Pitre, and sailed thence before the day for Basseterre, a condition having been inserted in one of the clearances, that the ship should pass that way to take the orders of government, and the captain also expecting, in consequence of a notice which had been given by his governor, that there would be a convoy at that place. It appeared that the captain had paid an extra fee in order to procure his clearances, that he might take the benefit of the convoy. The ship arrived at Basseterre two months before the day on which she was warranted to sail, and was detained there by the governor until after the day. It was proved that Basseterre was in the direct course of the voyage. Under these circumstances, it was holden, that there had been a *bonâ fide* and complete inception of the voyage, on the day the ship sailed from Point-a-Pitre, and consequently that the warranty had been complied with.

A ship was insured "at and from Surinam and all or any of the West India islands (except Jamaica) to London, warranted to sail on or before the 1st of August." The vessel sailed before the 1st of August from Surinam, where she had taken in her homeward cargo, and arrived at Tortola, one of the West India islands, on the 4th, to find the convoy, but the proper convoy having before that time sailed with the trade, she afterwards took sailing instructions from another ship as convoy, and was lost in her voyage home. The underwriters contended, that by the terms of the policy, the vessel ought to have sailed from the last of the West India islands at which she meant to touch on or before the 1st of August; and that her sailing from Surinam

t *Thellusson v. Fergusson*, Doug. 361. u *Wright v. Shiffner*, 11 East, 515. 2 Camp. N. P. C. 247. S. C.

for Tortola, so as not to arrive there in the ordinary course till the 4th, and, consequently, not being able to sail from Tortola till after the 1st, was a breach of the warranty, and precluded the plaintiff from recovering. But the court were of opinion, that there was a *bonâ fide* compliance with the terms of the warranty, according to the meaning of the parties.

2. *Safety of Ship at a particular Time.*—Goods were insured from the lading of them², on board a certain ship, “lost or not lost,” and at the bottom of the policy was added, “*warranted well on a particular day.*” It appeared that the defendant underwrote the policy in the afternoon of that day, and that the ship was lost about eight o’clock in the morning of the same day. It was holden, that the warranty did not mean that the ship was well at the time when the defendant subscribed the policy, but at *any time* on that day, and consequently that it had been complied with.

Action on policy of insurance against fire on ship *Hero*⁷, for one month, on the terms that the ship should be safe moored in the harbour of Portsmouth during the period for which the insurance was made; the ship was accidentally burned within that time. It appeared in evidence, that the ship was first moored off the beach, in order to clear her bottom; she was then removed to Hardway, and lastly was moored at March’s wharf, in order the more conveniently to take in her cargo, but had never been taken out of the harbour. It was insisted for the defendant, that the removing the ship from her moorings at one place to the other, was a discontinuance of the risk; so also the laying her down on the beach to clear her bottom. But, per Lord Ellenborough C. J., “where a vessel is only removed from one part of the harbour to the other, for the more convenient purpose of repairs, or of taking in her cargo, but does not go beyond the bounds of the harbour, and is safely moored at the different parts of the harbour, when she is so removed according to the policy, it is not such an act as will avoid the policy.” Verdict for plaintiff.

3. *To depart with Convoy.*—The next species of warranty which falls under consideration, is a warranty that the ship insured shall sail or depart with *convoy*, by which term is to be understood, “a naval force under the command of a person appointed by the government of the country, to which the vessel insured belongs.”

x *Blackhurst v. Cockell*, 3 T. R. 360. y *Clarke v. Westmore*, London sittings, B. R. 25 May, 1807.

The form of expression, as to this warranty, is different in different policies; in some, that the ship shall depart with convoy; in others, that she shall depart with convoy *for the voyage*. In substance, however, these expressions are the same; for it has been solemnly decided, that although the words of the policy are merely "to depart with convoy," yet those words must be understood to mean that the ship shall depart with convoy *for the voyage*, as much as if the words "for the voyage" had been added^a.

If a ship does not sail with the convoy appointed by government, it is not a sailing with convoy within the terms of the warranty^b; hence the protection of a ship of war accidentally bound on the same voyage, although discharging the office of convoy, is not a convoy within the meaning of the warranty; but a convoy appointed by the admiral commanding in chief upon a foreign station, will be considered as a convoy appointed by government^c.

It may be laid down also, as a general rule, that a warranty to depart with convoy is not complied with, unless sailing instructions are obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained (43).

When the policy is silent as to the place from which the vessel is to depart with convoy, the usage of merchants puts a construction on it, and the warranty must be understood to mean, that the ship shall sail with convoy from the place of general rendezvous, or that place where convoys are to be had: as, if a vessel be insured from London to the East

^a Per Holt C. J. and the greater part of the court, in *Jeffery v. Legendra*, 3 Lev. 321. after several arguments on special verdict, per tot. cur. Carth. 217. *Lilly v. Ewer*, Doug. 72. S. P.

^b *Hibbert v. Pigou*, Park, 329. Marsh. 272.
^c S. C. See also *Audley v. Duff*, 2 Bos. & Pul. 111.

(43) "The value of a convoy appointed by government, is a great measure arises from its taking the ships under control, as well as under protection. But that control does not commence until sailing instructions have been obtained, nor can it be enforced otherwise than by their means. Indeed the reason of that rule, which requires that the convoy should be appointed by government, shews the necessity of having sailing instructions, since without them the ship does not stand in that relation, or under those circumstances, in which she can take the full benefit of the government convoy." Per Eldon C. J. in *Anderson v. Pitcher*, 2 Bos. & Pul. 169.

Indies, warranted to depart with convoy, and the ship sail with convoy from the Downs, it is a fulfilment of the warranty^c (44).

It is not necessary, that the vessel should in all cases sail with convoy bound precisely to the place of her destination^d. Whether the convoy be sufficient must depend on the usage of trade and the orders of government; and it is the province of the jury to determine, whether, under the circumstances, the warranty has been satisfied (45).

It sometimes happens^e, that the force first appointed is to accompany the ships only for a part of their voyage, and to be succeeded by another; at other times a small force is detached from the main body, to bring them up to a particular point; if a vessel sail under the protection of a force thus appointed^f or detached^g, the warranty is complied with.

Although the terms of this warranty do not express it, yet it is essentially necessary, that the ship should not only depart, but also *continue* with the convoy until the end of the voyage, unless she be prevented by absolute necessity.

Case on a policy of insurance on the ship *Speedwell*^h, from London to Lisbon, *warranted to depart from England with convoy*. The ship sailed from London in December, and arrived at Spithead, (the place where the Lisbon convoy was to be met with) whence she sailed on the 25th December, with the convoy. On 26th December a storm arose, which separated her from her convoy, and rendered her so leaky, that she was obliged to sail for Plymouth, where she arrived on the 28th December. Having been refitted and made a

^c Lethullier's case, Salk. 443. but Holt C. J. contra. Gordon v. Morley, Str. 1265. per Lee C. J.

^d D'Eguino v. Bewicke, 2 H. Bl. 551.

^e Abbott, 217.

^f Smith v. Readshaw, Park, ch. 18. p. 249. *Dé Garay v. Clagget*, 20.

^g Manning v. Gist, Marsh, 269. Audley v. Duff, 2 Bos. & Pul. 111.

^h Morrice v. Dillon, London Sittings after M. T. 22 G. 2. coram Lee C. J. MSS.

(44) No convoy ever sails from the port of London. Abbot's Law relative to Merchant Ships and Seamen, 2d. ed. p. 216. Occasional convoys are appointed by the admiral on the station to sail from the Downs to Portsmouth, &c.; but such convoys are never appointed by the admiralty.

(45) "It has always been understood, that provisions for a departure with convoy have relation to the custom of trade, and the orders of government, and ought therefore to receive a liberal construction." Per Heath J. in *Audley v. Duff*, 2 Bos. & Pul. 115.

tight ship, as was supposed, she sailed again on 13th February following, but *without convoy*. A few days after, she encountered another violent storm, and on 19th February, she was totally lost near Ireland. Lee C. J. held, that the sense of the warranty was not to be taken literally; that the meaning was, not only to *depart* with convoy, but to *keep with* convoy during the whole voyage, and that this had always been so holden: that absolute necessity alone, such as rendered it impossible to keep with convoy, could excuse; as being driven by a tempest to some foreign port or place where convoy could not be had; but that was not the present case, the ship having been driven into an English port. He, therefore, was of opinion, that this was not a loss within the policy; and accordingly a verdict was found for the defendant.

If a ship sails with convoy^l, but is separated by stress of weather, and does all in her power to rejoin the convoy, this will be considered as a sufficient compliance with the warranty, so as to render the insurers liable.

The security of trade, in time of war, has been considered as depending so essentially on ships sailing with convoy, that by a late statute^k (46), (which is to continue in force during the present hostilities with France) it is enacted, 1. "That no ship, belonging to any of his Majesty's subjects (except as therein provided (47),) shall sail from any port

^l Jeffery v. Legendra, 3 Lev. 320. ^k Stat. 43 G. 3. c. 57. See Cohen v. Carth. 216. Salk. 443. 1 Show. 320. Hinckley, 1 Taunt. R. 249.
⁴ Mod. 58.

(46) A similar statute was made during the last war. See stat. 38 G. 3. c. 76.

(47) The cases excepted from the operation of this act will be found in the 6th and 8th sections, and are as follow: 1. Ships not required to be registered. N. Foreign-built ships in British ownership are not required to be registered; consequently, they fall within this exception; and, where such ships are insured, it has been holden not to be necessary to communicate to the underwriters, at the time of making the policy, that the ship is foreign-built. Long v. Duff, 2 Bos. & Pul. 209. 2. Ships licensed by the lord high admiral to depart without convoy. N. A policy on goods will not be affected by the terms of the license not having been complied with on the part of the ship-owner. Edwards v. Footner, 1 Camp. N. P. C. 532. 3. Ships proceeding with due diligence, from their port of clearance outwards, to join convoy appointed to sail from some other port. 4. Ships bound to or from any place in Ireland.

er place without convoy. 2. That the master shall use his utmost endeavour to continue with the convoy during the whole or such part of the voyage as the convoy is appointed to protect him, and not separate without leave of the commanding officer; and a penalty of 1000*l.*, or in case the cargo be naval or military stores, 1500*l.*, is imposed on him, if he sails without convoy, or separates therefrom without leave, subject, however, to a reduction, by the court in which the action for the penalty is brought, to a sum not less than 50*l.* 3. In case of a departure without convoy, or wilful separation, insurances upon ship, goods, freight, or other interest, (the property of the master or commander, or person interested in ship or cargo, or being privy to such sailing without convoy or wilful separation,) shall be void: no premium shall be recovered, and persons settling losses upon such insurances shall forfeit 200*l.*; and, further, the master is to give a bond before he can be allowed to clear outwards, in the penalty of the value of the ship, to be forfeited upon sailing without convoy or wilful separation.

4. *Neutral Property*.—If the insurance be effected in time of war, and the party insuring be the subject of a neutral state, it is usual for him, in order to induce the underwriter to accept a smaller premium, to warrant that the subject matter of the insurance is neutral property, which is usually done by inserting in the policy the words “warranted neutral,” or “warranted neutral property”; by which¹ is to be understood, that the thing insured is neutral property at the time when the risk commences, not that it shall continue so during the whole voyage, for the risk of *future* war is undertaken by the insurer in every policy. But though it is not necessary, that a ship, warranted neutral, should continue neutral during the whole voyage; because, if she be neutral at the time of sailing, the breaking out of war on the next day will not discharge the underwriter, yet the ship must not forfeit its neutrality by the misconduct of the parties on board; hence where, on an insurance of a ship

1 *Eden v. Parkison*, Doug. 732. *Tyson v. Gurney*, 3 T. R. 477. per Bull.

ler J. in *Salonucci v. Johnson*, Park. 864.

5. Ships bound from one place in Great Britain to another. 6. Ships belonging to the East India or Hudson's Bay Company. 7. Ships sailing from a foreign port or place, in case there be not any convoy appointed, nor persons at such foreign port duly authorized to appoint convoys, or to grant licenses for sailing without convoy.

warranted neutral^a, it appeared that the master and crew had broken their neutrality, in the course of the voyage insured, by forcibly rescuing the ship, which had been seized and carried into port by a belligerent power, for the purpose of search, it was holden, that the assured could not recover.

That a warranty of neutrality may be satisfied, it is necessary,

1. That the vessel insured should belong to the subject of a neutral state.

2. That the vessel should be navigated, not only according to the law of nations, but also in conformity to the particular treaties subsisting between the country to which she belongs and the belligerent states (48).

If, therefore, a state in amity with a belligerent power has, by treaty, agreed that the ships of their subjects shall only have that character when furnished with certain documents, whoever warrants a ship to be the property of such subject, should provide himself, at the time when the ship sails, with those evidences, which have, by the country to which she belongs, been agreed to be the necessary proof of that character.

In an action on a policy upon a ship warranted Dutch property^a, it appeared that the ship in question was originally a French privateer bearing a French name; that having been captured by the English, she was carried into Liverpool, and there named *The Three Graces*. A merchant there purchased her for a house at Amsterdam. Having been insured by a Dutch name, and warranted as in the policy, she went to sea, was captured by the French, and finally condemned by the parliament of Paris, under her English name, as lawful prize. The court were of opinion, that the sentence of the parliament of Paris was conclusive against the warranty.

So where it appeared, that a ship, warranted American^a,

^a *Garrels v. Kensington*, 8 T. R. 330. ^a *Rich v. Parker*, 7 T. R. 705. See
^a *Barsillai v. Lewis*, Park, 359. and further on this subject, *Baring v.*
MS. note of Buller J. cited by Lawrence J. in Pollard v. Bell, 8 T. R. 441. *Christie*, 5 East, 298.

(48) "Courts of admiralty are to proceed on the known *jus gentium*, or on the treaties between particular states; such treaties do not alter the *jus gentium* with respect to the rest of the world, but as between those particular states they are considered as engrafted on the *jus gentium*." Per *Ld. Kenyon C. J.* in *Bird v. Appleton*, 3 T. R. 567.

had not on board a passport, which was required by the treaty between France and America; it was holden, that the assured could not recover, inasmuch as the warranty had not been complied with; for that required that the ship should be entitled to all the privileges of the American flag, and in order to be entitled to these privileges, she should have had a passport (49).

But it is not necessary², in order to satisfy a warranty of neutrality, that the vessel should be navigated in conformity to an *ex parte* ordinance made by one of the belligerent states, and to which the neutral state is not a party.

A neutral ship may carry enemy's property from its own to the enemy's country, without being guilty of a breach of neutrality³; provided that neither the voyage or commerce be of a hostile description, nor otherwise expressly or impliedly forbidden by the law of this country; although such ship, in consequence of carrying enemy's property, be liable to detention or being carried into British ports, for the purpose of search.

The evidence usually adduced to falsify this warranty⁴, or to prove a breach of forfeiture of neutrality, which amounts to a breach or forfeiture of the warranty, is the judgment or sentence of a court of admiralty, or other court having jurisdiction in questions of prize, by which the ship or goods insured, and warranted neutral property, have been condemned as prize.

Since the judgment of the House of Lords in *Lothian v. Henderson*⁵, it may be assumed as the settled doctrine of a court of English law, that all sentences of foreign courts, of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of insurance, upon every subject immediately and

² *Mayne v. Walter*, Park, 362. *Pol-* ³ *3 Bos. & Pol.* 499, per Ellenborough
lard v. Bell, 8 T. R. 434. *Bird v. Ap-* C. J. delivering the opinion of the
pleton, 8 T. R. 562. *Price v. Bell*, court in *Bolton v. Gladstone*, 5 East,
1 East, 663. 155. and per Sir J. Mansfield C. J.
⁴ *Barber v. Blakes*, 9 East, 222. in *Siffken v. Lee*, 2 N. R. 489.
⁵ Marsh. 228.

(49) In the case of an insurance upon goods, in a certain ship, which ship is not represented as a neutral, at the time when the insurance is effected, although she be in fact a neutral, it is not necessary that she should be documented as such. *Dawson v. Atty*, 7 East, 367. See *Bell v. Carstairs*, 14 East, 393.

properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially.

Consequently, where such sentences are given in evidence, and it appears that they proceed on a ground which falsifies the warranty of neutrality, the assured will thereby be prevented from recovering. In one case^a, indeed, where a ship was condemned as lawful prize in a foreign court of admiralty, and it was not stated in the sentence upon what ground the condemnation proceeded, it was holden, that it should be presumed that it proceeded on the ground of the ship being the property of enemies, and that the sentence was conclusive evidence to falsify the warranty.

In *Baring v. Clagett*, 3 Bos. & Pul. 201. the court being of opinion, that the sentence of condemnation proceeded either on the ground of the ship not being neutral property, or on the ground that she was not properly documented, so as to entitle herself to the privileges of a neutral, adjudged the sentence to be conclusive evidence against a warranty of neutrality.

Whether the foreign sentence profess distinctly and directly to condemn the ship, on the ground of its being enemies' property, or whether it can be collected only from other parts of the proceedings, that such was the ground of decision^a, our courts are equally bound by the sentence; and this rule holds, although it appears on the face of the sentence, that the prize-court arrived at the conclusion through the medium of rules of evidence and rules of presumption established only by the particular ordinances of their own country, and not admissible on general principles^a.

In short, wherever the foreign courts adjudge the vessel to be good prize, upon a ground within their jurisdiction, and such ground falsifies the warranty, our courts will, by the comity of nations, which has always prevailed among civilized states, give credit to and consider themselves as bound by their adjudication, without examining the reasons by which the foreign courts have arrived at their conclusion (50).

^a *Saloucci v. Woodmass*, Park, 362. ^x *Bolton v. Gladstone*, 2 Tannt. 85.
^a *Bolton v. Gladstone*, 5 East, 155.

(50) "A warranty of neutrality must, I conceive, now be understood, as containing in itself (among other things) a stipulation that the contract of assurance shall be void, if the subject matter

Hence, as foreign courts of admiralty may decide on the construction of treaties, if they expressly adjudge a ship to be good and lawful prize for a breach of treaty, such sentence is conclusive in our courts against a warranty of neutrality, although, in the sentence, the foreign court may have referred to *ex parte* ordinances, and drawn inferences from such ordinances, in order to shew an infraction of treaty.

The sentence is equally to be regarded, as evidence of the facts inducing the condemnation, and upon which the condemnation proceeds, as of the judicial act of condemnation.

In the case of an insurance upon ship^s, goods, and freight, all belonging to nearly the same American proprietors, which, as it appeared by the sentence, had been condemned on account of the common default of all the proprietors *in their joint character of ship owners* in not having a regular passport on board, as required by the treaty of their own state with France; it was holden, that the assured could not claim from the underwriter an indemnity for a loss thus occasioned by themselves; although the ship was not warranted or represented to be an American; for the ship owner is bound to have such documents as are required by treaties with particular nations on board, to evince his neutrality in respect to such nations.

By the sentence of a French court of admiralty^a it appeared, that the ship insured, "*warranted American*," had been condemned as enemy's property, for want of having on board a *role d'equipage*, or list of the crew, such as is required by a marine ordinance of France, and adjudged by the court there to be requisite within the meaning of the treaty of commerce between France and America, it was holden to be conclusive evidence against the warranty of neutrality, though, in fact, the ship was American.

So where the sentence states, that the ship was con-

y *Baring v. Royal Exch. Ass. Comp.*
5 East, 99.

z *Bell v. Carstairs*, 14 East, 374.
a *Geyer v. Aguilar*, 7 T. R. 681.

warranted neutral be condemned as enemies' property; and, if a warranty of neutrality contains this stipulation, the sentence of a court of competent jurisdiction condemning a ship on account of its want of neutrality, is the proper evidence, according to every principle and rule of our law, to determine that fact." Per Lawrence J. in *Lothian v. Henderson*, 3 Bos. & Pul. 524.

demned on the ground of having violated her neutrality^b, and acted contrary to the law of nations and the faith of treaties, such sentence is conclusive evidence against the warranty of neutrality. But where the grounds of confiscation are stated obscurely, and the court cannot collect what the precise ground was^c, or where the sentence adjudges the ship to be lawful prize, not because it is enemies' property, but for reasons which lead to a contrary conclusion^d; or if it appear, that the condemnation proceeded *solely* on the ground of the ship having violated an *ex parte* ordinance, to which the neutral country had not assented^e; in such cases the sentence, is not conclusive evidence against the warranty of neutrality.

A vessel, warranted Dantzic, was captured by a French privateer^f, and condemned as prize by a French court of admiralty. This sentence of condemnation was afterwards reversed by a court of appeal, which court, however, refused to give the appellants their costs and damages, because the muster-roll did not express the place of nativity of the crew, which was required by French regulations. The ship was proved to be a Dantzic ship, and to have had on board, at the time of the capture, all the papers ever carried by Dantzic ships. The French regulations were not shewn to have been within the knowledge of the people of Dantzic. In an action on the policy it was contended, that the underwriters were not liable, because the sentence of restitution had refused damages and costs to the assured; but the court were of a contrary opinion, Sir J. Mansfield observing, that no question had ever arisen as yet with respect to the refusal of a prize court to allow damages and costs, as discharging the underwriters from their liability; and, indeed, it would be very strange if such a refusal could discharge them. It was a matter of mere discretion in the court. In this case the refusal to allow them was founded on two private ordinances of *France*, not shewn to be within the knowledge of the people of Dantzic, and, therefore, the refusal of the French court could afford no ground for holding the underwriters released from their engagement to pay. The C. J. added, that he saw no reason for extending the doctrine of the conclusiveness of sentences of courts of admiralty.

It is to be observed also, that the sentence of a foreign

^b Garrels v. Kensington, 8 T. R. 230. ^e Bird v. Appleton, 8 T. R. 562.

^c Berpardi v. Motteux, Doug. 574. ^f Siffken v. Lee, 2 N. R. 484.

^d Fisher v. Ogle, 1 Camp. N. P. C. 418.

^e Calvert v. Bovil, 7 T. R. 523.

court, where it is conclusive, is conclusive only as to the grounds of the sentence, and not as to the premises which led to the conclusion^g.

The preceding remarks, as to foreign sentences of condemnation, being conclusive evidence against the warranty of neutrality, must be confined to legal sentences, that is, sentences of a prize court, acting and exercising functions either in the belligerent country, or in the country of a co-belligerent or ally in the war^h; for sentences of condemnation, pronounced by the authority of the capturing power, *within the dominions of a neutral country*, to which the prize may have been taken, are illegalⁱ, and, consequently, inadmissible. And that is to be considered as a neutral country for this purpose^k, in which the forms of an independent neutral government are preserved, although a belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority.

Implied Warranty. 1. *Not to deviate*^l.—Another condition implied in the contract of insurance is, that the ship shall not deviate. Hence, arises another ground of defence on which the underwriter may insist, viz. that there has been a *deviation*, by which term is to be understood a wilful and unnecessary departure from the due course of the voyage insured, either with or without the consent of the assured, for any, even the shortest, space of time.

The effect of a deviation is not to avoid the contract *ab initio*, but only to determine it from the time of the deviation, and to discharge the insurer from all subsequent responsibility. Hence, damage sustained before the actual deviation must be made good by the underwriters^l. From the moment of deviation, however, the contract is at an end, and it is immaterial from what cause the subsequent loss arises.

If two ports of discharge are named in the policy, and the ship intends going to both, she must take them in the order named in the policy. Hence, where a ship insured for A. and B.^m, meaning to go to both, went first to B. in her way to A.; it was holden to be a deviation from the voyage insured, not being in the order named in the policy.

A ship having liberty to put into one port, put into ano-

^g *Christie v. Secretan*, 3 T. R. 192.

^h *Oddy v. Bovill*, 2 East, 473.

ⁱ *Havelock v. Rockwood*, 3 T. R. 966.
The Flad Oyen, 1 Rob. A. B. 135.

^k *Donaldson v. Thomson*, 1 Camp. N. P. C. 439.

^l *Green v. Young*, 2 Raym. 640. Salk. 444.

^m *Beatson v. Haworth*, 6 T. R. 331.

ther equally in her way^a; this was holden to be a deviation, and to avoid the contract, though neither the risk nor the premium would have been greater, if the putting into such other port had been allowed by the policy.

A ship was insured from Lisbon to England^a, with liberty to call at any one port in Portugal; it was holden, that under such a policy the party had only a liberty to call at some port in Portugal, in the course of the voyage to England.

A ship was insured from London to the southern whale fishery and back again^a, "with leave to carry letters of marque, and to cruise for, chase, capture, man, and *see into port*, any ships of the king's enemies." It was holden, that although the ship insured might be authorized under the terms of this policy, in accompanying prizes to any convenient port consistently with the main adventure, seeing them safely moored there, and perhaps stopping a reasonable time to give directions for their proceeding on their final destination, yet *remaining in port until a prize was repaired* could not be considered as warranted by those terms.

A deviation never puts an end to the insurance, unless it be the voluntary act of those, who have the management of the ship.

Hence, where a policy was effected on a ship carrying letters of marque^a, from Bristol to Newfoundland, and the orders of the owners were to put a few hands on board any prize that might be taken, and send her to Bristol, but that the ship should proceed to Newfoundland; notwithstanding which *the crew obliged the captain to go back to Bristol* with a prize taken during the voyage, and in so doing, the ship was captured, it was holden, that this deviation was justifiable, and that the underwriter was not discharged from his obligation to indemnify the assured.

The owner of a ship (which was about to sail on a voyage from Lisbon to Madeira^a, from Madeira to Saffi, on the coast of Africa, in ballast, and thence to Lisbon, with a cargo) was desirous of having the insurance effected on part of the freight from Saffi to Lisbon. The underwriters objected, on account of the distant period at which the risk was to commence; however, on a representation some time

^a Elliot v. Wilson, 7 Bro. P. C. 459.

⁴ Bro. P. C. 470. Tomlin's ed.

^o Hogg v. Horner, Marsh. 397.

^p Jarratt v. Ward, 1 Camp. N. P. C. 263.

^q Elton v. Brogden, 2 Str. 1264.

^r Driscoll v. Passmore, 1 Bos. & Pul. 201. See also Driscoll v. Bovil, 1 Bos. & Pul. 313.

afterwards by the owner, that he had received intelligence of the ship's arrival at Madeira, and that she was about to proceed immediately on her voyage, the insurance was effected. When the ship arrived at Madeira, all the crew, except two, being alarmed by reports of some Moorish cruisers being off Saffi, and of their having captured and ill-treated a Dane and an American, quitted the ship, and refused to return to it, unless the captain would promise to sail immediately for Lisbon. Under these circumstances, the captain carried the ship back to Lisbon; but on his arrival there, the charterers insisted on his proceeding directly from thence to Saffi, which he accordingly did, and was captured in his return from Saffi to Lisbon. It was in evidence, that the difference of season, arising from this delay, did not vary the risk. It was holden, that the deviation was justified by the special circumstances.

And this rule holds as well in the case of a limited, as a general policy.

Hence, where a policy was effected on goods on board a ship, for a certain voyage^d, "against sea-risk and fire only," and the ship was forcibly carried out of the course of her voyage, and detained by a king's ship, but afterwards was released, and permitted to proceed on the voyage insured, during which the goods insured sustained sea-damage; it was holden, that the deviation having been occasioned by force, and without any consent on the part of those who had the management of the ship, the underwriter was liable, although the voyage was made longer than it otherwise would have been, by the detention of the king's ship.

Grounds of necessity, which will justify a deviation, are,

1. Going into port for the purpose of refitting or repairing^e.
2. Stress of weather^f.
3. Avoiding an enemy, or seeking for convoy^g.

Whenever such circumstances exist as render a deviation necessary^h, the voyage (which may then be termed the voyage of necessity) must be pursued according to its due course in like manner as the original voyage.

^a Scott v. Thompson, 1 Bos. & Pul. N. R. 181.

^u Delany v. Stoddart, 1 T. R. 32.

^x Bond v. Gonsales, Salk. 445.

^t Admitted by Ld. Hardwicke Ch. in Mottaux v. London Ass., 1 Atkyns, 545.

^y Lavabre v. Wilson, Doug. 284.

An intention to deviate from the due course, not carried into execution^z, will not be considered as a deviation.

It is to be observed also, that, in a policy on ship and freight^a, it is not an implied condition that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay, or otherwise increasing the risk of the underwriters. Hence, where a ship was compelled in the course of her voyage to enter a port, for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course, by reason of a scarcity at her loading ports, and during her justifiable stay in the port so entered for that purpose, she took on board bullion for freight, the jury having found that no delay in the voyage was occasioned thereby, it was holden not to avoid the policy.

So where a ship had liberty to *touch* at a port, it was holden^b not to be any deviation to take in a quantity of salt during her stay there, the ship not having thereby exceeded the period allowed for her remaining there. N. In this case a communication had been made to the underwriter that the ship was to *touch* for the purpose of trade. It seems, however, that the words "liberty to touch" will not authorize a general trading^c. See farther on this subject *Phelps v. Auldjo*, 2 Camp. N. P. C. 350.

2. *Seaworthiness*.—In every marine insurance, whether on ship or goods, there is an implied warranty, that the ship is seaworthy at the commencement of the risk, or, in the language of the charter-party, tight, staunch, and strong. Any defect, which may endanger the ship, though unknown to the assured, will discharge the underwriter; for it is the duty of the assured to provide a good ship, in such state and condition as to be able to perform the destined voyage, *i. e.* seaworthy.

As to any decay to which the loss of the ship may be attributed, the question will be, whether the same commenced previously to or after the insurance made. If a ship, in a short time after having sailed, become leaky, and founders, or is obliged to return to port, there not having been any storm, external accident, or cause adequate to the producing

^z *Foster v. Wilmer*, Str. 1249. *Thel-* ^b *Urquhart v. Bernard*, 1 Taunt. 450.
^l *lason v. Fergusson*, Doug. 361. ^c *Per Sir J. Mansfield*, S. C. 1 Taunt.
Kewley v. Ryan, 2 H. Bl. 343. 456.
² *Raine v. Bell*, 9 East, 195. recog-
nized in *Laroche v. Oswin*, 12 East,
121.

such effect, it may be presumed that she was not at the time of sailing seaworthy, but the conclusion, in all cases of this kind, is to be drawn by the jury, to whom the several circumstances are to be submitted.

It is also an implied condition, that the ship insured shall be furnished with every article necessary for the purpose of safe navigation during her voyage, *i. e.* properly equipped with sails^d, a sufficient number of hands on board (51), an able captain, skilful pilots, &c.

In an action on a policy of insurance on ship and goods from Stettin to London^e, in which the plaintiff declared upon a loss by reason of the vessel sinking before she had been moored twenty-four hours, in consequence of an anchor having been driven into her; it appeared, that the captain had taken a pilot on board at Orfordness, on entering the river Thames, who quitted her at Halfway Reach; after which, and before she had come to her moorings higher up the river, the accident happened, which occasioned the loss, and in consequence of which the vessel filled with water, before she had been moored twenty-four hours; but the precise time at which the damage was sustained within those limits, or by what particular default, was not ascertained. The captain had also left the ship before the time of the actual loss. It was holden, that the underwriter was discharged; Lord Kenyon C. J. observing, that in this case the captain did not perform his duty, for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind, that there shall be some person on board the ship apparently qualified to navigate her. If the underwriters had been previously informed, that there would be no pilot on board during the ship's sailing up the river Thames, probably they would not have undertaken the risk. On the ground, therefore, that there was no pilot on board the vessel when the accident happened, he was of opinion that the underwriter was discharged (52).

^d *Wedderburn v. Bell*, 1 Camp. N. P. C. 1.

^e *Law v. Hollingsworth*, 7 T. R. 160.

(51) In *Hunter v. Potts*, London Sittings after Trin. T. 45 G. 3. Lord Ellenborough C. J. said, that the vessel must not only be seaworthy, but the crew must be adequate to discharge the ordinary duties, and to meet the usual dangers to which she is exposed.

(52) Another question was agitated, *viz.* Whether the defendant would have been answerable, if there had been a pilot on board,

4. *Re-assurance.*

Re-assurance is a contract made by the first insurer or underwriter, with a view of securing himself from a risk, by throwing it on other underwriters, who are termed re-assurers. This is allowed in almost all the trading countries in Europe, and was permitted by the law of England, until the stat. 19 G. 2. c. 37., by the fourth section of which re-assurance is prohibited, except in three cases: 1. The insolvency; 2. The bankruptcy; 3. The death of the insurer; and even in these cases, it must be expressed in the policy to be a re-assurance, and the re-assurance must not exceed the amount of the sum before assured.

Although the first section of the above-mentioned statute does not extend to foreign ships, yet the fourth section does. Consequently a re-assurance, even by a foreigner on a foreign ship, is illegal.

5. *Wager Policy—Stat. 19 G. 2. c. 37.—Interest of Assured.*

An insurance being a contract of indemnity, its object is not to make a positive gain, but to avert a possible loss. Hence, as a person cannot be said to be indemnified against a loss which can never happen to him, a policy without interest is not an insurance, but a mere wager only. Such policy, therefore, is properly denominated a wager policy. Although contradictory decisions are to be found in the books, as to the legality of wager policies, before the statute 19 G. 2., yet they have been recognised as legal contracts by modern judges; and it seems now to be admitted, that, by the

f *Andree v. Fletcher*, 3 T. R. 161.

Lucena v. Craufurd, 3 Bos. & Pul.

g See the opinion of *Chambre J.* in

101.

whom the captain believed to be of sufficient skill, but who was not duly qualified under stat. 5 G. 2. c. 20. The court declined giving an opinion, as in the case before them no pilot was on board.

Pilotage from Dover, Deal, and the Isle of Thanet, up the rivers Thames and Medway, is regulated by statutes 3 Geo. 1. c. 13. 7 Geo. 1. c. 21. and 43 Geo. 3. c. 152. Pilotage down the Thames, and through the North Channel, to or by Orfordness, and round the Long Sand-Head into the Downs, and down the South Channel into the Downs, and from or by Orfordness up the North Channel and the Thames and Medway, by stat. 5 Geo. 2. c. 20.; and pilotage into or out of the port of Liverpool, by stat. 37 Geo. 3. c. 78. See *Abbot's Law relative to Merchant Ships*, p. 168. ed. 2d. See also modern regulations as to pilots in a recent statute, 47 Geo. 3. Sess. 2. c. 70. Local,

law of merchants, and particularly by the law of England as it stood at the time of passing the act 19 G. 2., a wager policy, in which the parties by express terms, such as the words "interest or no interest," or, "without proof of interest," disclaimed the intention of making a contract of indemnity, was then (contrary to older determinations) deemed a valid contract of insurance; but that a policy containing no such clause, disclaiming or dispensing with the proof of interest, was to be considered as a contract of indemnity only, upon which the assured could never recover without proof of an interest (53). But it having been found, by experience, that the making assurances, "interest or no interest, or without further proof of interest than the policy," had been productive of many pernicious practices, and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurances had been perverted; and that which was intended for the encouragement of trade and navigation, had, in many instances, become destructive to the same; it was enacted, by stat. 19 G. 2. c. 37. s. 1., "that no assurances should be made by any persons, bodies corporate or politic, on any ships *belonging to his majesty, or any of his subjects* (54), on any goods laden, or to be laden, on board such ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and that such assurances should be void."

But by s. 2, it is provided, "That insurances on private ships of war, fitted out by any of his majesty's subjects, solely to cruise against his enemies, may be made by or for

(53) This opinion of Chambre J. is confirmed by an observation of Lord Hardwicke, in a case which was decided before the passing of the stat. 19 G. 2. c. 37. Speaking of the difference between insurances from fire and marine insurances, he says, "in the insurance of ships, 'interest or no interest' is almost constantly inserted, and, *if not inserted*, you cannot recover, unless you prove a property." Per Lord Hardwicke C. in the *Sadler's Company v. Badcock*, 2 Atk. 556.

(54) In consequence of these words it has been holden, that this section does not apply to the case of foreign ships, and that insurances, "interest or no interest" may be made upon them. *Thellusson v. Fletcher*, Doug. 315. And although the words "interest or no interest" are omitted in the policy on a foreign ship, yet in declaring on such policy, it is not necessary to aver that the assured had an interest. *Craufurd v. Hunter*, 8 T. R. 13. *Nantes v. Thompson*, 2 East, 385.

the owners thereof, interest or no interest, free of average, and without benefit of salvage to the insurer."

And by s. 3. it is also provided, "That any effects, from any port or places in Europe or America, in possession of the crowns of Spain or Portugal, may be insured in the same manner as if this act had not been made."

Having detailed the provisions of the stat. 19 G. 2. c. 37., it will be necessary briefly to consider what that interest is, the protection of which is the proper object of a policy of assurance. And this is to be collected from considering what is the nature of such contract^a. Now insurance is a contract, by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other, that he shall not suffer loss or damage by the happening of the perils specified to certain things, which may be exposed to them. This being the general nature of the contract, it follows, that it is applicable to protect persons against uncertain events, which may in any wise be of disadvantage to them; not only those persons, to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those also, who, in consequence of such events, may have intercepted from them the advantage or profit, which but for such events, they would acquire according to the ordinary and probable course of things. That a person must somehow or other be interested in the preservation of the subject-matter exposed to perils follows from the nature of this contract, when not used as a mode of wager, but as applicable to the purposes for which it was originally introduced, but to confine it to the protection of the interest which arises out of property, is adding a restriction to the contract which does not arise out of its nature. Interest, therefore, with reference to the subject under consideration, does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage to the person insuring: and where a person is so circumstanced, with respect to matters exposed to certain risks, as to have a moral certainty of advantage but for those risks, he may be said to be interested in the safety of the thing. Having endeavoured to explain the nature of an insurable interest, it will be proper to add, that it is not necessary such in-

^a Per Lawrence J. in *Lucena v. Craufurd*, D.P. 2 Bos. & Pul. N.R. 390, where this subject is very elaborately discussed.

terest should be indefeasible; for the consignee of goods, under a bill of lading, has an insurable interest in such goods, although they may be stopped in transitu on their passage home^l. So also has an executor before probate. In like manner it has been holden, that where a ship was taken as prize by the conjoint forces of the army and navy, the captors, before condemnation, had an insurable interest under stat. 45 G. 3. c. 72. s. 3. whereby the crown gives up its right in the prize to the captors, although such interest was defeasible, as well by the release of the crown, as the adjudication of the court of admiralty^k.

X. Evidence.

In order to support his action, the plaintiff must be prepared with the following proof: 1. The policy must be produced in evidence, and the subscription of the defendant must be proved. 2. Evidence must be given of the interest of the insured in the subject-matter of the insurance (55). In insurances upon ships, the mere fact of the possession of the assured, as owners, is sufficient *prima facie* evidence of ownership^l, without the aid of any documentary proof or title-deeds on the subject, such as the bill of sale or ship's register, unless such further evidence is rendered necessary in support of the *prima facie* evidence of ownership, in consequence of the adduction of some contrary proof on the other side:

As in an action on a policy of insurance on freight^m, where

i Per Lord Ellenborough C. J. 11 East, 698.

k Stirling v. Vaughan, 11 East, 619.
2 Camp. N. P. C. 225. S. C. cited in
Robertson and others v. Hamilton,
B. R. M. 52 G. 3.

l Robertson v. French, 4 East, 136.

See also Thomas v. Foyle, 5 Esp. N. P. C. 88.

m Camden v. Anderson, 5 T. R. 709.
recognised by Le Blanc J. in Marsh
v. Robinson, B. R. London Sittings
after H. T. 42 G. 3. 4 Esp. N. P. C.
98.

(55) In Amery v. Rogers, 1 Esp. N. P. C. 207. where an action was brought on a policy of insurance on a ship, Lord Kenyon C. J. was of opinion, that the proof of the insured having exercised acts of ownership, in directing the loading, &c. of the ship, and paying the people employed, was sufficient proof of interest. And in M^r Andrew v. Bell, 1 Esp. N. P. C. 373. where the insurance was on a ship and her cargo, the plaintiff, in order to prove interest, produced the bill of lading, and the captain proved that it was his bill of lading, and that he had the goods specified in it on board. Lord Kenyon C. J. held, that the interest was sufficiently proved.

the interest in a ship and its earnings were alleged to be in four persons, who were partners in trade, and it was proved by the plaintiffs, that the ship had been paid for by all the four partners; but the defendant having produced the register, wherein the ship was registered in the names of two of the partners only; it was holden, that as the title to freight arose only from ownership, and the register was conclusive evidence that only two were owners, and as there was not any count in the declaration, stating the interest to be in two only, the plaintiffs could not recover.

In insurances upon goods, the mere production of a bill of parcels from the seller abroad^a, with the receipt to it, and proof of his hand-writing, has been holden to be sufficient proof of the interest of the assured.

In a declaration on a policy of insurance effected by the plaintiff^b, as agent of A. and B., it was averred, "that A. and B., at the time of effecting the policy, and thence until the time of the loss, were interested in the goods insured, to a large amount, to wit, to the amount of all the money ever insured thereon." At the trial it appeared, that, at the time when the policy was effected, another person was jointly interested in the goods, together with A. and B. The court were of opinion, that although A. and B. had not an exclusive interest, yet they had such an interest as would answer the terms of the averment; Chambre J. observing, that the averment in substance was nothing more than that the parties for whose benefit the assurance was made, had an interest in the subject of that insurance. They were not bound by the terms of the averment to shew any thing more than that they had an interest; and if they had shewed an interest to the extent of one-hundredth part of the cargo, it would be sufficient. The spirit of the stat. 19 G. 2. only required, that the policy should not be a gaming policy.

3. It must be proved, that the loss happened in the same manner as is stated in the declaration, that the underwriter may be apprized of the case, which he has to encounter by evidence.

Where a loss is averred to be by *perils of the sea*^c, and some of the goods insured are spoiled, and others saved, the expenses of the salvage may be given in evidence (without stating them specially) on this averment, as being a damage within the cause of action as laid.

^a Russel v. Boehm, Str. 1127. per Lee ^b Cary v. King, Ca. Temp. Hardw. B. C. J. R. 304.

^c Page v. Fry, 2 Bos. & Pul. 240. But see Bell v. Ansley, B. R. E. T. 52 G. 3.

If a total loss of the ship is stated in the declaration^q, and damages laid accordingly, evidence of a partial loss may be received, and the plaintiff may recover to the amount of such loss as he is able to prove.

In an action upon an insurance upon profits^r, the assured must prove a loss: for where, upon an insurance of profits of a cargo of slaves, valued at 400*l.*, the plaintiff declared for a total loss by perils of the seas, and it appeared that the vessel was wrecked, whereby many of the slaves were lost, but the remainder got into the market, and were there sold; it was holden, that, although the produce of the slaves sold did not give a profit upon the whole adventure, the plaintiff was not entitled to recover, because it did not appear, that if there had been no shipwreck, and all the slaves had got to market, any profit would have been produced.

It is a general rule, that nothing which depends on the proceedings of a court can be proved by parol testimony^s; hence, in cases of capture and recapture, neither the salvage nor the expenses incurred for ascertaining the amount of the salvage (56), can be otherwise proved than by producing the proceedings of the admiralty court.

A slip of paper, wherein the names of the underwriters were mentioned, in the order in which they had originally been applied to^t and had agreed to underwrite, (and which was different from that in which their names appeared on the policy) having been tendered in evidence to shew the true order of the names, for the purpose of letting in evidence of a false representation made to the first underwriter in fact; the court were of opinion, that such paper could not be received in evidence, for want of a stamp, the effect of the evidence being to shew, through the medium of a writing, that the contract entered into between the parties was different from that which it appeared to be on the face of the policy.

In a case where it appeared that a license to trade with an enemy^u, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, and the secretary was examined, who said that he had, as

^q 2 Burr. 904.

^r Hodgson v. Glover, 6 East, 316.

^s Thellusson v. Shedden, 2 Bos. & Pul.
N. R. 328.

^t Marsden v. Reed, 3 East, 572.

^u Kensington v. Inglis, 8 East, 278.

(56) By stat. 43 G. 3. c. 160. s. 40. which see ante, p. 859. it is expressly required on all cases of capture and recapture, that some proceeding should be had in the admiralty court, to ascertain what the amount of salvage shall be.

he believed, thrown it aside among the waste papers of his office, and did not know what was become of it; that he had afterwards searched for, but did not recollect the finding it, and thought that he had not found it: it was holden, that this was reasonable and probable evidence of the loss of such license, so as to let in parol evidence of its contents; the paper not being considered as of any further use at the time, and the attention of the witness not having been then called particularly to the circumstances; and further, that the witness might speak to the contents of the license from memory, though he had made an entry of it in his memorandum book, for the private information of himself and the governor, which book was not produced, he having given it to the governor, who was gone abroad without returning it to him; for such book, if in court, would not have been evidence *per se*, but could only have been used by the witness to refresh his memory.

When a ship insured is captured in a voyage to an enemy's country^x, and the British license legalizing the voyage is lost, to shew that she had such a license, it is necessary to prove the loss of the paper purporting to be a license put on board the ship, and to produce examined copies of the order in council for granting the license, and of the copy of the license preserved in the secretary of state's office.

To prove a warranty, that a ship insured was of a particular nation, it is *prima facie* evidence, that she carried the flag of that nation at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port^y.

The production of a letter, dated abroad, and addressed to J. S. in England, with the English ship-letter post-mark upon it, which directed a policy to be effected, is sufficient to prove that J. S. was "the person residing in Great Britain, who received the order for, and effected such policy."

Upon a question concerning the seaworthiness of a ship^a, after the evidence of persons who have examined her condition, experienced shipwrights, who never saw her, may be called to say whether, upon the facts sworn to, she was, in their opinion, seaworthy or not, in conformity to the rule of evidence, that where a matter of skill or science is to be decided, the jury may be assisted by the opinion of

^x *Eyre v. Palgrave*, 2 Camp. N. P. C. 605.

^y *Arcangelo v. Thompson*, 2 Camp. N. P. C. 620.

^a S. C.

^a *Beckwith v. Sidebotham*, 1 Camp. N. P. C. 116.

persons peculiarly acquainted with it from their professions or pursuits.

In an action on a policy on goods on board a ship^b, the master and owner was held not a competent witness to prove the ship seaworthy, until he had been released by the owner of the goods.

So in an action against an underwriter^c, for a loss by barratry of master, it was holden, that the master could not be examined by the defendant, to prove that the barratry was committed by the consent, and with the privity, of the owners, without a release by the defendant.

In an action on a policy on goods^d, the declaration contained an averment that the plaintiffs were interested in the subject-matter of insurance; the defendant, meaning to dispute this at the trial, gave them notice to produce certain articles of agreement executed by the plaintiffs and the captain (who was not a plaintiff). The instrument was produced in pursuance of the notice, when there appeared to be two subscribing witnesses to it; the plaintiffs insisted that the defendant could not give it in evidence without calling one of those witnesses to prove it. Lord Ellenborough being of that opinion, the plaintiffs recovered. A motion was made for a new trial, on the ground that the instrument coming out of the hands of the plaintiffs, *parties* thereto, upon notice to produce it, it was not necessary to be proved by one of the subscribing witnesses, according to the rule laid down in *R. v. Middlezoy*, 2 T. R. 41. But Lord Ellenborough said, that that case, which was much questioned at the time, had been since overruled, and that the production of the instrument, in pursuance of the notice, did not supersede the necessity of proving it by one of the subscribing witnesses, if any, as in ordinary cases. And Lawrence J. said, that this had been so ruled by Lord Kenyon in a subsequent case respecting a will, which the adverse party, in whose hands it was, had notice to produce, and did produce at the trial, when it appeared that there were subscribing witnesses to it: and Lord Kenyon held, that the party who gave the notice was bound to call one of the subscribing witnesses to prove the will. In the present case, however, the court made the rule absolute for a new trial on payment of costs, the defendant

^b *Rotheroe v. Elton*, Peake's N. P. C. 34. *Kenyon C. J.* *Fox v. Lushington*, *ib. n. S. P.* per Kenyon, C. J. *c* *Bird v. Thompson*, 1 Esp. N. P. C. 339.

^d *Gordon and others v. Secretan*, 8 East, 548. *Bateson v. Lewin*, *Middlesex Sittings after H. T.* 52 G. 3. Lord Ellenborough C. J. S. P.

having made an affidavit of his being surprized, and not prepared at the trial, for want of knowing who the subscribing witnesses were (57).

XI. *Return of Premium.*

IN cases where the contract of insurance is void, as on the ground of non-compliance with a warranty, *e. g.* to sail with convoy, sea worthiness, or the like, and fraud cannot be imputed to the assured, the assured will be entitled to a return of premium; because where the contract does not attach, there is not any risk (58).

In cases where the risk is entire, and has once commenced as in the case of a deviation, there shall not be any return or apportionment of premium^e (59). A ship was insured "at

e Tyrie v. Fletcher, Cowp. 668. Meyer v. Gregson, B. R. East. 24 G. 3. Marsh. 568.

(57) The doctrine established in *Gordon v. Secretan*, was recognised by Heath J. in *Wetherston v. Edgington*, 2 Camp. N. P. C. 94., and there applied to an agreement not under seal. But although the mere possession of an instrument does not dispense with the necessity, which lies on the party calling for it, of producing the attesting witness, yet where a person is called on to produce a deed to which he is a party, and under which he claims to hold an estate, and he produces it, it shall be taken to be a good deed, so far as relates to the execution as against himself. *Pearce v. Hooper*, 3 Taunt. 60.

(58) "If the risk be not run, though it be by neglect, or even by fault of the insured, yet the insurer shall not retain the premium." Per Lord Mansfield C. J. in *Stevenson v. Snow*, 3 Burr. 1240. "Where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned, *because a policy of insurance is a contract of indemnity*. The underwriter receives a premium for running the risk of indemnifying the insured, and to whatever cause it be owing, if he does not run the risk, the consideration for which the premium or money was put into his hands, fails, and therefore he ought to return it." Per Lord Mansfield C. J. in *Tyrie v. Fletcher*, Cowp. 668.

(59) Upon an insurance at and from a place, if an usage can be proved warranting a division of the risk, the insured will be entitled to an apportionment of the premium, in case one of the risks be not run. *Long v. Allen*, B. R. E. 25 G. 3. Marsh. 570.

and from London to any port or place, for twelve months, at 9*l.* per cent. warranted free from capture by the Americans." The ship sailed from the port of London, and was taken by an American privateer about two months afterwards. It was contended that a proportionable part of the premium ought to be returned, that 9*l.* was much more than adequate to the risk actually run, viz. only two months. But the court were of opinion that there ought not to be a return of premium, Lord Mansfield, C. J. observing, "that there were two general rules established, applicable to the question: The first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; *because a policy of insurance is a contract of indemnity.* The underwriter receives a premium for running the risk of indemnifying the insured, and to whatever cause it be owing, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. 2d. Another rule is, that if that risk of the contract of indemnity has *once* commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run, the contract is for the whole entire risk, and no part of the consideration shall be returned." The same rules were laid down by Lord Mansfield, C. J. in *Lorraine v. Thomlinson*, Doug. 587.

A ship, employed in the coasting trade, was insured against capture for 12 months: "at 15*s.* per cent. per month, 18*l.*" The ship was lost in a storm, within the first two months. An action having been brought for the amount of the premium (18*l.*), the defendant pleaded non-assumpsit as to all except 3*l.*, and as to that a tender. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other issue, for the sum of 15*l.*, subject to the opinion of the court, whether he was entitled to recover that sum of 15*l.* or the sum of 3*l.* only. It was contended on the part of the defendant, that this was not one entire contract for a year, but an insurance from month to month for twelve months; if the policy had been for a year, or twelve months, and the premium a gross sum, the court could not have apportioned it, because the risk in one

f *Tyrie v. Fletcher*, Cowp. 668.

g *Lorraine v. Thomlinson*, Dougl. 585.

month might be greater than in another, but here the *parties* have apportioned the *premium*: that the insurance was the same as if there had been 12 policies for each month. But per Lord Mansfield C. J. it is an insurance for twelve months, for one gross sum of 18*l*. They have calculated this sum to be at the rate of 15*s*. per month. But what was to be paid down? Not 15*s*. for the first month, and so from month to month; but 18*l*. at once.

A ship with her cargo was insured "at and from Honfleur to the coast of Angola^a, during her stay and trade there, at and thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur at a premium of 11*l*. per cent." The ship sailed to A., but in this part of the voyage she was guilty of a deviation. It was contended, on the part of the plaintiff, that there ought to be an apportionment and return of premium; but the court were clearly of opinion that there ought not to be any return. Lord Mansfield C. J. said, the question depends upon this: Whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks? for, by splitting the words, and taking "at" and "from" separately, it will make six; viz. 1. At Honfleur; 2. From Honfleur to Angola; 3. At Angola, &c. The argument must be, that, if the ship had been taken between Honfleur and Angola, there must have been a return. By an implied warranty, every ship must be seaworthy, when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was seaworthy when she left Honfleur, the underwriters would have been liable though she had not been so at Angola, &c.; but according to the construction contended for on the part of the plaintiff, she must have been seaworthy, not only at the departure from Honfleur, but also when she sailed from Angola, and when she sailed from St. Domingo.

But if the insurance be in effect on two or more voyages, and one or more have not commenced, there shall be an apportionment and return of premium in respect of those voyages which have not commenced, as will appear from the following case:

An insurance was effected upon a ship at five guineas per cent^l., lost or not lost, at and from London to Halifax, warranted to depart with convoy from Portsmouth for the

^a *Bermon v. Woodbridge*, Doug. 791. ⁱ *Stevenson v. Snow*, 3 Burr. 1257.

voyage (60). Before the ship arrived at Portsmouth, the convoy was gone. Notice of this was immediately given by the insured to the underwriter, and at the same time he was also desired either to make the long insurance, or to return part of the premium. The jury found that the usual settled premium, from London to Portsmouth, was one and one half per cent., and that it was usual, in cases like the present, for the underwriter to return part of the premium, but the quantum was uncertain. It was stated, that the plaintiff made to the defendant an offer of allowing him to retain one and one half per cent. for the risk from London to Portsmouth. It was holden, that the plaintiff was entitled to recover such part of the premium as had been given for insuring the ship on the voyage from Portsmouth to Halifax: Denison J. observing, that it was most equitable that the defendant should retain the premium for such part of the voyage only as he had run the risk of; that the insured had a right to have the other part restored to him. And this was agreeable to the general principle of actions for money had and received to the plaintiff's use; where the defendant had no right to retain it, he must refund it. Foster J. added, that there was not any consideration for the remainder of the premium, *i. e.* for the voyage from Portsmouth to Halifax, wherein no risk was run by the insurer, who only insured the voyage with convoy; therefore he had no right to retain the premium for this. Wilmot J. said, that upon this policy there were two distinct points of time, in effect two voyages, which were clearly in the contemplation of the parties, and only one of the two voyages was made, the other not at all entered upon. It was a conditional contract, and the second voyage was not begun, therefore the premium must be returned; for upon the second part of the voyage the risk never took place.

Lord Mansfield C. J., commenting on the preceding case in *Tyrie v. Fletcher*, Cowp. 669., observed, "that the first object of insurance was from London to Halifax: but if the ship did not depart from Portsmouth with convoy, then there was to be no contract from Portsmouth to Halifax: why then, the parties have said, 'we make a contract from London to Halifax, but, on a certain contingency, it shall only be a contract from London to Portsmouth.' That contingency not happening, reduced it in fact to a

(60) In Mr. J. Blackstone's report of this case, 1 Bl. R. 315, the words of the policy are "warranted to depart with convoy for the voyage," omitting the words "from Portsmouth."

contract from London to Portsmouth only." All the judges in delivering their opinion laid the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages. And in *Bermon v. Woodbridge*, Doug. 790. the same learned judge observed, that in *Stevenson v. Snow* there was a contingency specified in the policy, upon the not happening of which the insurance would cease. It depended on the contingency of the ship sailing with convoy from Portsmouth, whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. And in *Loraine v. Thomlinson*, Doug. 587. Lord Mansfield again remarked, that *Stevenson v. Snow* was decided on the ground of there being two voyages.

The next case in which an apportionment has been allowed is that of *Long v. Allen*, B. R. E. 25 G. 3. Park, 390. Marsh. 570. There the terms of the policy were, "at and from Jamaica to London, warranted to depart with convoy." The ship sailed without any convoy. An express usage was found, that on insurances couched in the same terms with the policy in question the premium had been returned, deducting one half per cent., if the ship departed without convoy. The court decided in favour of the return of premium, on the ground of the usage.

In *Rothwell v. Cook*, 1 Bos. and Pul. 172. the policy was on ship, "at and from Hull to Bilboa, warranted to depart from England with convoy:" the ship sailed from Hull to Portsmouth, and thence departed with convoy, which not being direct for Bilboa she afterwards left, and was captured: the warranty not having been complied with, the plaintiff would have been nonsuited, but it was insisted that he was entitled to a verdict for the premium, which was found accordingly. On motion to set aside this verdict, Eyre C. J. said, the verdict now stands for the return of the whole premium, and the question is, whether it should stand for the whole, for none, or for a part? If for a part, I do not know how we are to settle it; it must depend on there being, or not being, some rule to be found to direct us in making the decision. Certain it is, that if the ship had been lost in coming round to Portsmouth, the underwriters would have been liable; it is not therefore reasonable, that they should have been so liable without retaining a proportion of the premium. You should inquire whether there is any rate of premium among the underwriters from Hull to Portsmouth, and whether the premium has ever been apportioned where there has been only one insurance, without

distinguishing the different risks in the policy. If you can find any rule, I recommend you to adopt it. But if you cannot agree, we think the whole premium ought not to be returned; and, therefore, the present verdict must be set aside, and the case go to a new trial. Rule absolute.

Where there is an agreement to return part of the premium, "if the ship *arrive*," the assured will be entitled to a return, in the event of an arrival of the ship at the port of destination, although it should appear, that the ship has sustained a loss occasioned by a sea risk¹, or that the ship has been captured and recaptured, and the assured has been obliged to pay the salvage¹. But every arrival of the ship at the port of her destination is not an arrival within the fair construction of the agreement; such, for instance, as an arrival in possession of an enemy at a neutral port, to which she was insured, or an arrival at her port in England as the property of other persons after a capture. In short, it must be an arrival at the destined port in the course of her voyage².

The captors of a ship and cargo effected an insurance; restitution was afterwards awarded to the owners (with the exception of a small part of the cargo); it was holden, that the captors were not entitled to a return of premium; for they had possession of the property insured; and if it were a legal capture, they were entitled; if it were not, the Court of Admiralty might amerce them in damages and costs, and they had a right to insure themselves against a decision, which might have loaded them with damages and costs³.

The formal receipt in the policy is conclusive evidence of the receipt of the premium as between the assured and underwriter in an action for the return of the premium⁴.

Where the assured or his agent⁵ has been guilty of fraud, as where the assured knew that the ship⁶ was lost, at the time of effecting the policy, the premium cannot be recovered; and the same rule holds, where the contract of insurance is illegal⁷, unless the assured was ignorant of the illegality at the time of effecting the insurance⁸.

A policy broker is the agent of both the assured and un-

k Simond v. Boydell, Dougl. 966.

l Aguila v. Rodgers, 7 T. R. 491.

m Adm. by Kenyon C. J. S. C.

n Boehm v. Bell, 8 T. R. 154.

o Dabell v. Mair, 1 Camp. N. P. C. 532.

p Chapman v. Fraser, B. R. T. 33 G.

2. Park, 917.

q Tyler v. Horne, London Sittings after H. T. 25 G. 3. Lord Mansfield C. J. Park, 217.

r Lowry v. Bourdieu, and other cases, ante, vol. 1. p. 91.

s Oom v. Bruce, 12 East, 295.

derwriter, and is the trustee for the assured as long as the policy remains in his hands, to adjust and receive returns of premium for him when the events have happened on which they are to be made. Hence the broker, having notice that the events have happened which entitle the assured to such returns, is authorized to deduct so much from the gross amount of the premiums, and to pay over the difference only to the underwriter^t.

In *assumpsit*, on a policy of insurance^u, with a count for money had and received, the defendant had not paid any money into court. The defence was, that the ship was not seaworthy; on which point, without any direct evidence of fraud, the case was submitted to the jury. General verdict for defendant.—N. It was not intimated to the jury, that the plaintiff was entitled to a verdict for a return of premium. On an application to the court, it was holden that the plaintiff was entitled to a verdict for the premium on the count for money had and received; but the court hoped, that in future the counsel would in his opening demand the premium, in every case where it was intended to insist upon it on failure of his claim for the loss.

XII. Of *Bottomry* and *Respondentia*.

Bottomry.—An agreement entered into by the owner, or, under certain circumstances, by the master of a ship (61), whereby, in consideration of a sum of money advanced, (for the purpose of enabling the borrower to fit out the ship, or purchase a cargo for an intended voyage) the borrower undertakes to repay the same with a stipulated interest, if the voyage shall terminate successfully, and binds himself and the ship and tackle for the due performance of the agreement, is termed *bottomry*. The term "*bottomry*" is derived from the original language of the agreement, which merely spoke of the keel or bottom of the ship; but the expression was always considered as being used figuratively, viz. *pars*

^t Shee v. Clarkson, 12 East, 507.

^u *Penson v. Lee*, C. B. M. 41 G. 3.
² Bos. & Pul. 330.

(61) In a foreign country, in the absence of the owners, and in cases of necessity, the master may take up money on *bottomry* for the use of the ship.

pro toto. This agreement is sometimes made in the form of a deed-poll, called a bill of bottomry, executed by the borrower, and sometimes in the form of a bond with a penalty.

Respondentia.—If the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then by the terms of the agreement the borrower only personally is bound to answer the contract, who therefore, in this case, is said to take up money at respondentia.

Bottomry and respondentia differ very materially from a simple loan^x. 1. In the case of a loan the money is at the risk of the borrower, and must be repaid at all events. But where money is lent on bottomry or respondentia, the money is at the risk of the lender during the voyage. 2. Upon a loan, legal interest only can be reserved. But upon bottomry or respondentia, any interest upon which the parties agree may be reserved.

By stat. 7 G. 1. c. 21. s. 2. "all contracts and agreements made or entered into by any of his Majesty's subjects, or any person or persons in trust for them, for the loan of any money by way of bottomry on any ship or ships in the service of foreigners, and bound to or designed to trade in the East Indies, are void."

By stat. 19 G. 2. c. 37. s. 5. "all money lent on bottomry, or at respondentia, upon ships belonging to any of his Majesty's subjects, bound to or from the East Indies, must be lent only on the ship, or upon the merchandizes on board, and shall be so expressed in the condition of the bond, and the benefit of salvage shall be allowed to the lender, who alone shall have a right to make insurance on the money so lent; and in case it shall appear that the value of his share in the ship, or the effects on board, does not amount to the full sum or sums he has borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed, as he has not laid out on the ship or merchandize laden thereon, with lawful interest for the same, in the proportion the money laid out shall bear to the whole money lent, notwithstanding the ship or merchandize shall be totally lost."

By stat. 16 Car. 2. c. 6. (made perpetual by stat. 22 and 23 Car. 2. c. 11. s. 12.) reciting that masters and mariners of ships, having insured or taken upon bottomry greater

sums of money than the value of their adventure, do wilfully cast away, burn, or otherwise destroy, the ships under their charge, to the merchants and owners' great loss; for the prevention thereof for the future, it is enacted, "that if any captain, master, mariner, or other officer, belonging to any ship, shall wilfully cast away, burn, or otherwise destroy, the ship unto which he belongs, or procure the same to be done, he shall suffer death as a felon" (62).

XIII. *Insurance upon Lives.*

THE insurance of life is a contract whereby the insurer⁷, in consideration of a certain premium, either in a gross sum or by annual payments, undertakes to pay to the person for whose benefit the insurance is made, a stipulated sum of money, or an annuity equivalent, upon the death of the person whose life is insured, *whenever this shall happen*, if the insurance be for the whole life; or *in case it shall happen within a certain period*, if the insurance be for lesser term than for life.

The utility of this species of insurance is obvious. Persons possessed of life incomes are hereby enabled to secure, after their death, a competent provision for their families; and they are also enabled, even in their life-time, in cases of urgent necessity, to raise money by way of loan, (which they could not do on mere personal security); for, by insuring their lives to the amount of the sum borrowed, the lender may be certain of having repaid the money lent in the event of their death. By these insurances also, the fines to be paid upon the renewal of leases, or on the descent of copyhold estates, may be provided for⁸.

Several corporations and societies have been established for the assurance of lives. Among these the following may be mentioned; 1. The Amicable Society, established in 1706. 2. The Royal Exchange and London Assurance, in the reign of George the First. 3. The Equitable Assurance, 1762. 4. The Westminster Society. 5. The Pelican

⁷ Marsh. 664.

⁸ Marsh. 664.

(62) For other statutes relating to the destruction of ships, see ante, p. 862, n. (21).

Life Insurance. 6. The Globe Insurance. 7. The London Life Association, established May, 1806, No. 48, St. Paul's Church-yard. The distinguishing principle of the London Life Association is, that the assured are to be partakers of the benefit arising therefrom *during life*; the profits, when ascertained, are to be divided among the proprietors, in proportion to the amount of their respective interests in the society, on the most equitable plan, and are to be payable to them during their respective lives, at such times and in such manner, as the court of directors, under the sanction of a general court of proprietors, shall appoint. 8. The Rock Life Assurance Company, (established A. D. 1806,) New Bridge-street, Blackfriars. In this institution, *each proprietor is under the necessity of insuring a sum on his own life, if accepted by the directors, or on that of an approved nominee, to the amount of one quarter of the stock standing in his name.* The representatives of the insured are to receive a certain sum at his decease, and also such addition as may have been made to that sum by the previous resolution of the society, agreeably to the deed of settlement. The insured are either proprietors or non-proprietors. The proprietors are answerable each to a certain amount; they deposit a certain sum, and form a capital sufficient to answer all contingencies. The insured non-proprietors have not any share in the risk; they pay certain premiums, in consideration whereof, at their decease, their representatives will become entitled to the sum insured, and will partake equally with the proprietors in such addition as may have been made at different times to each policy.

The making insurances on lives, or other events, wherein the insured had no interest, having introduced a mischievous kind of gaming, it was enacted by stat. 14 Geo. 3. c. 48. first, "that no insurance should be made by any person, body politic or corporate, on lives, *or on any other event*, wherein the person for whose benefit, or on whose account the policy is made, has no interest, or by way of gaming or wagering. 2dly, That in every policy on lives or other events, the name of the person interested, or on whose account it is made, must be inserted. 3dly, That no greater sum should be recovered, or received from the insurer, than the amount of the interest of the insured (63).

Whether the insured has an interest within the meaning

(63) Marine insurances are expressly exempted from the operation of this statute. See the proviso in the 4th section.

of the preceding statute, is sometimes the subject of litigation; as to which, it has been holden, that a creditor has an insurable interest in the life of his debtor, at least where he has only the personal security of the debtor^a (64). But although a creditor may insure the life of his debtor to the extent of his debt, yet such a contract is substantially a contract of indemnity against the loss of the debt^b, and, therefore, if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment by a third party, it being immaterial from what fund the debt has been discharged so as the creditor has received satisfaction.

But where the debt accrues by virtue of an illegal security, as a note for money won at play, such interest is not insurable^c.

In an action on an insurance on the life of J. S.^d for one year, and during the life of the plaintiff, but in case the plaintiff should die before J. S. the policy to be void; it appeared that J. S. had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to this insurance, having appointed the plaintiff executor of his will, and directed him to make assurance. It having been objected, that the insurance was made by a person not having any beneficial interest, Lord Kenyon C.J. held this to be a sufficient interest to support the action, observing, that the plaintiff could not assent to the legacy, before the testator's debts were paid, without being guilty of a *devastavit*; and, being executor, all the interest of the testator vested in him. The cause proceeded, but it appearing, that J. S. was in a dying state, when the policy was effected, the defendant had a verdict.

Before a policy of insurance upon a life is effected, it is usual for the party (whose life is the object of the insurance) to subscribe a written declaration, touching his age, state of health, (*e. g.* whether he has ever had the small-pox, gout, &c.) and other circumstances.

a *Anderson v. Edie*, Hil. 1795, per c *Dwyer v. Edie*, London Sittings
Ld. Kenyon C. J. at N. P. Park, after H. 1788. Buller J. Park, 432.
439.

b *Godsall v. Boldero*, 9 East, 72. d *Tidswell v. Ankerstein*, Peake's
N. P. C. 151.

(64) See the remarks of Serjeant Marshall on this point in p. 673, 4, 5.

The substance of this declaration is recited, and the whole is incorporated by reference in the policy; at the end of which, a proviso is usually inserted, declaring the policy to be void in case the insured should die upon the seas, or go beyond the limits of Europe, without leave obtained from the directors, or commit suicide, or die by the hands of justice, or if the age of the assured exceed years, or if the assured be afflicted with any disorder which tends to the shortening of life (65); or in case the declaration should contain any averment which is not true.

Such are the conditions which are usually required, varying, however, according to the regulations of the different insurance companies. The policy of imposing these terms is obvious; for if there be not any warranty or condition on the part of the insured, the insurer is subject to all risks, unless he can shew that there has been a fraudulent concealment or suppression of the truth^e.

XIV. *Insurance against Fire.*

By this contract^f, the insurer, in consideration of a certain premium received by him, either in a gross sum, or by annual payments, undertakes to indemnify the insured against any loss or damage which he may sustain in his houses,

^e *Stackpool v. Simon*, per *Ld. Mansfield C. J.*, *H. T. 1779*, *Park*, 437.

^f *Marsh. 691.*

(65) *J. S.* was warranted in good health at the time of making the policy. In an action on the policy, it appeared, that in consequence of a wound which *J. S.* had received in battle many years before, and which had occasioned a partial relaxation or palsy, he could not retain his urine or *foeces*. This had not been mentioned to the insurer. *J. S.* died of a fever. It was proved by several physicians and surgeons, that the wound had not any connection with the fever, that the want of retention was not a disorder that shortened life, and that the party might, notwithstanding, have lived to the common age of man. Lord Mansfield told the jury, that the only question was, whether the party was in a reasonably good state of health, and such a life as ought to be insured on common terms? The jury, upon this direction, found a verdict for plaintiff.

A warranty that the party is in a good state of health will not be falsified by shewing, that he was troubled with spasms and cramps, and violent fits of the gout. *Willes v. Poole*, at *N. P.*, 1780. *Marsh. 669.*

or other buildings, goods, and merchandize, by fire, during a limited period of time.

A policy of insurance against fire is a contract which is not in its nature assignable^g; it is merely a special agreement with the person insuring, that the insurer will indemnify him against such loss or damage as he may sustain. The policy, however, may, and frequently is, assigned with the consent of the insurer.

In order to entitle the plaintiff to recover on a policy of insurance against fire, it must appear, that the policy was duly stamped.

The amount of the stamp duty on insurances against fire is fixed by stat. 48 G. 3. c. 149. schedule, Part I., and is one shilling on insurances upon buildings, goods, or other property, from loss by fire only.

It is necessary that the insured should have an interest or property at the time of insuring^h, and at the time the loss happens; and in case of loss, the insured can only recover to the extent of his interest, insurances against fire being within the stat. 14 G. 3. c. 48.

The form of the policy used by the different companies is nearly the same. The principal difference consists in the articles of the printed proposals, which are incorporated by reference with the policy, and are to be considered as part of the contractⁱ.

By the printed proposals of a fire insurance company^j, it was stipulated, "that the insured should procure a certificate of the minister, &c. of the parish, importing that they knew the character of the insured, &c." it was holden, that the procuring such certificate was a condition precedent to the right of the insured to recover; and that supposing the minister, &c. had wrongfully refused to grant such certificate, it would not vary the case, the rule being, that if a person undertake for the act of a stranger, that act must be done.

The policy usually provides, that "no loss or damage by fire, happening by any invasion, foreign enemy, or any mi-

^g Per Ld. King Ch. in *Lynch v. Dall*, 3 Bro. P.C. 497. but in *Tomlin's* ed. 4 Bro. P.C. 431.

^h Per Ld. Hardwicke in the *Sadler's Comp. v. Badcock*, 2 Ath. 555. See the statute in the preceding section.

ⁱ See *Routledge v. Burrell*, 1 H. Bl. 254.

^j *Worsley v. Wood*, 6 T. R. 710. See also *Oldman v. Bewicke*, 2 H. Bl. 577. n. to the same effect.

litary or usurped power whatsoever, will be made good by the insurer."

The words "usurped power," in the proviso¹, mean an invasion from abroad, or an internal rebellion, not the power of a common mob.

The Sun Fire Office, in the year 1727, introduced into the preceding exception the words "*civil commotion*," by reason of which it was holden², that the office was not liable for a loss sustained by the plaintiff, whose house and distillery were set on fire by the mob during the riots in the year 1780 (66).

In a policy of insurance against loss by fire³, from half a year to half a year, the insured agreed to pay the premium half-yearly, "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half-year; and it was also stipulated, that no insurance should take place until the premium was actually paid; a loss happened within fifteen days after the end of one half-year, but before the premium for the next was paid; it was holden, that the insurers were not liable, though the insured tendered the premium before the end of the fifteen days, but after the loss.

By a policy under seal⁴, referring to certain printed proposals, a fire office insured the defendant's premises from 11th of November, 1802, to 25th December, 1803, for a certain premium, which was to be paid yearly on each 25th of December, and the insurance was to continue so long as the insured should pay the premium at the said times, and the office should agree to accept it. By the printed proposals it was stipulated, that the insured should make all future payments annually, at the office, within fifteen days after the day limited by the policy, upon forfeiture of the benefit thereof, and that no insurance was to take place till the premium were paid; and by a subsequent advertisement

¹ Drinkwater v. London Ass., 2 Wils. 363. Wilmot, 222. S. C.
² Langdale v. Mason, Park, 425. Marsh. 689.

³ Tarleton v. Staniforth, 5 T. R. 695. Judgment affirmed in Exch. Ch. 1 Bos. & Pul. 471.
⁴ Salvin v. James, 6 East, 571.

(66) The plaintiff afterwards brought his action against the hundred upon the riot act, 1 G. 1. c. 5. s. 6. and recovered. Marsh. 691. An insurance company having paid a loss occasioned by riots, may recover back such loss in an action against the hundred, on the above act, suing in the name and with the consent of the insured. Mason v. Sainsbury, E. 22 G. 3. B. R. Marsh. 691.

(agreed to be taken as part of the policy), the office engaged that all persons insured there, by policies for a year or more, had been and should be considered as insured for fifteen days beyond the time of the expiration of their policies; it was holden, notwithstanding this latter clause, (the insured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, or otherwise they would not continue the insurance, and the insured having refused to pay such advanced premium) that the office was not liable for a loss which happened within fifteen days from the expiration of the year for which the insurance was made; though the insured, after the loss, and before the fifteen days expired, tendered the full premium which had been demanded; for the effect of the whole contract, &c. taken together, was only to give the insured an option to continue the insurance or not, during fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option, by giving notice that they would not renew the contract.

In covenant against the defendants, who were members of the Sun fire-office, a tender was pleaded and money paid into court, under the 19 G. 2. c. 37. s. 7. It was objected, that the statute did not extend to insurances against loss by fire; but the court overruled the objection, on the ground, that the statute was not necessarily confined to marine insurances; that it ought to be construed as extensively as the mischief, and there was as much reason to have money paid into court on a fire insurance as on any other^s.

CHAP. XXVI.

LIBEL.

- I. *Of the Nature of a Libel, and in what Cases an Action may be maintained for this Injury.*
 - II. *Of the Declaration and Pleadings.*
 - III. *Of the Evidence.*
-

I. *Of the Nature of a Libel, and in what Cases an Action may be maintained for this Injury.*

A LIBEL is a malicious defamation expressed in printing or writing, or by signs, pictures, &c. tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule (1).

An action on the case is maintainable against any person, who falsely and maliciously publishes any libel against another.

As there is a difference between the malignity and injurious consequences of slanderous words spoken or written^a, the one being sudden and fleeting, the other permanent, deliberate, and disseminated with greater ease; many words which, if spoken, would not be actionable, are actionable, if

^a Austin v. Culpeper, 9 Show. 314. King v. Lake, Hardr. 470. Per Hale C. B.

(1) "If any man deliberately or maliciously publishes any thing in writing concerning another, which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action lies against such publisher. Per Wilmot C. J. 2 Wils. 403.—"I have no doubt that the writing and publishing any thing which renders a man ridiculous, is actionable."—Per Bathurst J., S. C. See also the same opinion expressed by Gould J., S. C.

published in the way of libel (2). Hence the word *swindler*, if *spoken* of another, (unless it be spoken in relation to his trade or business) is not actionable^b; but if it be published in the way of libel, it is actionable^c. Hence, also, the publication of a letter containing some verses, in which plaintiff was called an *itchy old toad*, was deemed a libel^d. So the publication of a *letter*, in which plaintiff was stated to be one of the most infernal villains that ever disgraced human nature, has been holden actionable, without proof of special damage^e.

A fair and candid comment on a place of public entertainment, in a newspaper, is not a libel^f.

In like manner a comment upon a literary production, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer, unconnected with his publication; and a comment of this description every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; it is a loss which the party ought to sustain, inasmuch as it is the loss of fame and profits to which he was

^b *Savile v. Jardine*, 2 H. Bl. 531.
^c *J. Anson v. Stuart*, 1 T. R. 748.
^d *Villars v. Monsley*, 2 Wils. 403.

^e *Bell v. Stone*, 1 Bos. & Pul. 331.
^f *Dibdin v. Swan*, 1 Esp. N. P. C. 26.
Kenyon C. J.

(2) In *Bradley v. Methwyn*, B. R. M. 10 G. 2. MSS. which was an action on the case for a libel, Ld. Hardwicke, C. J. observed, that "the present case is not for words, but for a libel, in which the rule is different, for some words may be actionable, or prosecuted by way of indictment, if reduced into writing, which would not be so, if spoken only. For the crime in a libel does not arise merely from the scandal, but from the tendency which it has to occasion a breach of the peace, by making the scandal more public and lasting, and spreading it abroad; which was so determined in this court, in the case of *King v. Griffin*, Hil. 7 Geo. 2." This subject was much discussed in *Thorley v. E. of Kerry*, on error in Exch. Ch. E. T. 52 G. 3. where a defamatory writing, imputing hypocrisy to the earl, and that he used religion as a cloak for unworthy purposes, was holden to be actionable; Sir James Mansfield, who delivered the judgment, observing, that he was bound by the later authorities, although the distinction between speaking and writing was not to be found in Rolle's Abridgment, or the earlier editions of Comyns's Digest. The action was a common action on the case, and not an action for scandalum magnatum.

not fairly entitled^g. But if a person, under the pretence of criticising a literary work, defames the private character of the author, and instead of writing in the spirit, and for the purpose, of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller, and liable to an action^h.

A fair, plain, unvarnished account of the proceedings of a court of justice, is not a libelⁱ (3), but a highly coloured account of such proceedings, mixed up with insinuations of perjury^k, cannot be justified.

A false or scandalous matter contained in a petition to a committee of Parliament^l, or in articles of the peace exhibited to justices of the peace, or in any other proceeding in a regular course of justice, will not make the complaint amount to a libel.

Although that which is written may be injurious to the

^g Carr v. Hood, 1 Camp. N. P. C. 855.
^h n. Ellenborough C. J.

^h Nightingale v. Stockdale, London
Sittings after H. T. 49 G. 3. Ellen-
borough C. J.

ⁱ Curry v. Walter, 1 Bos. & Pul. 525.

^k Stiles v. Nokes, 7 East, 493.

^l Hawk. B. 1. c. 73. s. 8. Moulton
v. Clapham, B. R. E. 15 Car. 1. Sir
W. Jones, 431. March, 20. S. C.

(3) In the case of the King v. Wright, 8 T. R. 293. the court refused to grant a criminal information against a bookseller for printing a true copy of a report of a Committee of the House of Commons, though it reflected on the character of an individual. "It must not be taken for granted, that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances, and with whatever motive published, justifiable; but that doctrine must be taken with grains of allowance." Per Lord Ellenborough C. J. and Grose J. in Stiles v. Nokes, 7 East, 503. "It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry, are very distressing to the feelings of individuals, on whom they reflect; and if such circumstances were afterwards wantonly published, I should hesitate to say, that such unnecessary publication was not libellous, merely because the matter had been given in evidence in a court of justice." Per Lord Ellenborough C. J., S. C. "If a member of parliament publish in the newspapers his speech, as delivered in Parliament, and it contains charges of a slanderous nature against an individual, an information will lie for a libel; though had the words been merely delivered in Parliament, they would be dispunishable in the courts at Westminster." The King v. Ld. Abingdon, 1 Esp. N. P. C. 226.

character of another^m, yet if done *bonâ fide*, or with a view of investigating a fact, in which the party making it is interested, it is not libellous. Hence, where an advertisement was published by the defendant, at the instigation of A. the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A.; it was holden, that although the advertisement might impute bigamy to the plaintiff, yet, having been published under such authority, and with such a view, it was not libellous.

A letter written confidentially to persons who employed A. as their solicitorⁿ, conveying charges injurious to his professional character in the management of certain concerns which they entrusted to him, and in which B. the writer of the letter was likewise interested, was holden not to be a libel.

A defamatory writing^o, expressing only one or two letters of a name, in such a manner, that, from what goes before and follows after, it must necessarily be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel, as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions.

II. Of the Declaration and Pleadings.

Venue.—THIS is a transitory action, and consequently the venue may be laid in any county.

It may be stated as a general rule, that the venue cannot be changed in this action; to this rule, however, there are the two following exceptions. 1st, Where the writing and publication are confined to the same county^p. In this case the venue may be changed into such county^q. 2d, If the libel be sent out of England in a letter, the venue may be changed into that county in which the letter was written^r.

^m Delany v. Jones, 4 Esp. N. P. C. 191. ^p Pinkney v. Collins, 1 T. R. 571.
ⁿ M'Donnell v. Claridge, 1 Camp. N. P. C. 267. ^q Freeman v. Norris, 3 T. R. 306. E.
 of Kerry v. Thorley, B. R. M. 49.
^o Hurt's Case, Trin. 12 Ann. Haw. G. 3. MS. S. P.
^r Metcalf v. Markham, 3 T. R. 652.
 book 1. c. 73. s. 5.

According to the usual form of the declaration in this action, after the prefatory averments which the circumstances of the case may render necessary as inducement to the action, the plaintiff states, "that the defendant falsely and maliciously wrote and *published* (4) of and concerning (5) the plaintiff a false, &c. libel, which libel is according to the tenor and effect following;" the libel is then set forth *in hæc verba*, accompanied, however, with the necessary innuendos, in order to illustrate and explain the tendency and bearing of the libel, and to give it its force and application; and in this part of the declaration care must be taken, that the libel be so set forth, as to agree with that produced in evidence. If the nature of the case requires it, several counts are added, stating the case with variations, according to the discretion of the pleader. The declaration then concludes with the damage, either general, which the law supposes to have been sustained, or special, which the party has actually sustained, in consequence of the publication of the libel.

If the libel be written in a foreign language, the original should first be set forth in the declaration, and then the translation^e.

Of the Pleadings.

The general issue in this action is, not guilty.

If the matter of the libel be true, the defendant may plead it in justification (6); but in such justification if there

^a *Zenobio v. Axtell*, 6 T. R. 162.

(4) Although the *publication* of the libel must be stated in the declaration, yet it will be sufficient to state such matter as amounts to a publication, without using the formal word *published*. *Baldwin v. Elphinston*, 2 Bl. R. 1037.

(5) Judgment was arrested after verdict, because it was not laid that the libel was "of or concerning plaintiff." *Lowfield v. Bancroft* and another, Str. 934.

(6) The only authorities of which I am aware, for this position, are the dicta of Hobart C. J. in *Lake v. Hatton*, Hob. Rep. 253., and of Holt C. J. in an anonymous case, 11 Mod. 99.; but the position is warranted by the opinion of the profession, and the practice at the present day. See *J'Anson v. Stuart*, 1 T. R. 750. And in a late case of *Plunkett, solicitor general of Ireland, v. Cobbett*,

be any thing specific in the subject, issuable facts ought to be stated, and not general charges of misconduct; for where a libel charged an attorney with gross negligence, falsehood, prevarication, and excessive bills of costs in the business which he had conducted for the defendant; it was holden¹, that a plea in justification repeating the same general charges, without specifying the particular acts of misconduct was bad, upon demurrer; and that it was incumbent on the defendant, who must be taken to know the particular acts of misconduct, to disclose them. It is not any bar to the action, that the plaintiff has been in the habit of libelling the defendant²; although it may operate in mitigation of the damages.

To this action the defendant may plead the statute of limitations³, that is, "that the cause of action did not accrue

¹ *Holmes, Gent. one &c., v. Catesby*, ² *Finnerty v. Tipper*, ³ *Camp. N. P. C. 1 Taunt. 543.*

76.

^x 21 Jac. 1. c. 16.

tried before Lord Ellenborough C. J. Middx. Sittings, 26th May, 1804, (which was an action on the case for a libel, to which the defendant had pleaded N. G.) it was observed, by Lord Ellenborough C. J., in his direction to the jury, that "*in case the libel had been true, it would have been open to the defendant to have justified it on the record.*" It is worthy of remark, however, that though this doctrine is now taken for certain, yet it was not considered as settled even so late as the year 1735; for in the *King v. Roberts*, B. R. M. T. 8 G. 2. MSS. on a motion for an information against the defendant for a libel, Lord Hardwicke C. J. thus expressed himself: "It is said, that if an *action* were brought, the fact, if true, might be justified; *but I think that is a mistake*; such a thing was never thought of in the case of *Harman v. Delaney*, E. 4 Geo. 2. (Str. 898.) I never heard such a justification in an *action* for a libel even hinted at. The law is too careful in discountenancing such practices. All the favour that I know truth affords in such a case is, that it may be shewn in mitigation of damages in an *action*, and of the fine upon an indictment or an information."

Information against defendant for publishing a libel against Mr. Swinton, of Wadham College, Oxon, accusing him of sodomitical practices. Lee C. J. rejected evidence offered of defendant's reasons for the accusation, viz. that the supposed pathic had informed him of them, saying, that the only question was, whether defendant was guilty of publishing the libel. It had been always holden, that the truth of a libel could not be given in evidence by way of justification; because, if the person charged with any crime is guilty, he ought to be proceeded against in a legal course, and not reflected upon in such a manner. Bull. N. P. 9.

at any time within six years next before the commencement of the plaintiff's action."

III. Of the Evidence.

THE libel must be produced, and, before it is read, it must be proved that it was *published* by the defendant.

If it be proved, that the libel was bought in the shop of a bookseller^y, of a person acting in the shop as the servant of the bookseller, this will be *prima facie* evidence of a publication by the bookseller, inasmuch as he has the profits of the shop, and is therefore answerable for the consequences.

If the libel be in a foreign language, in which case, as it has already been observed, the libel must be set forth in the declaration, both in the original language, and in an English translation, further proof will be necessary (7).

In an action for a libel^z, after the libel, on which the action was brought, had been read, the plaintiff's counsel offered in evidence other libels written by the defendant. This having been objected to, on the ground that the plaintiff could not give in evidence any thing which would of itself constitute a ground for a distinct action; Lord Kenyon C. J. said, he thought that the evidence was admissible, and compared it to actions for slander, in which evidence of other words, besides those stated in the decla-

^y R. v. Almou, 5 Barr. 2696. ^z Lee v. Huson, Peake's N. P. C. 166.

(7) In the case of the R. v. Peltier, which was an information against defendant for a libel on Napoleon Bonaparte, the evidence on the part of the prosecution was as follows: 1. A witness proved, that he had purchased several copies of the book, containing the libel in question, of a certain bookseller, which copies he had marked at the time. 2. The bookseller proved that defendant was the publisher of the book, and employed him to dispose of the copies on his account, and that he had accounted for them. 3. An interpreter was then called, who swore that he understood the French language, and that the translation was correct. The interpreter then read the whole of that which was charged to be a libel in the original, and then the translation was read by the clerk at Nisi Prius.

ration were usually received, [to shew the malice of the defendant (S).]

In an action on the case for publishing a libel against the defendant in a paper entitled the Weekly Political Register^a, a witness was called, who proved that he had purchased one of the papers containing the libel in question *before* the action was brought; he was then proceeding to prove that he had purchased another copy of the same paper *after* the action was brought. This was objected to, on the part of the defendant, on the ground that the publication of the last-mentioned copy might become the subject of a future action, and, therefore, that it ought not to be given in evidence to increase the damages in this action. But Lord Ellenborough C. J. was of opinion, that although it was not admissible for the purpose of aggravating the damages, yet it was evidence to shew that the paper was circulated deliberately. But in *Finnerty v. Tipper*^b, Sir J. Mansfield ruled, that the plaintiff could not give in evidence other subsequent libels published concerning him by the de-

^a *Plunkett v. Cobbett*, before Ld. Ellenborough, Middx. Sittings, 26th May, 1804, MSS.

^b 2 Camp. N. P. C. 72.

(8) *Charlter v. Barret*, Peake's N. P. C. 22. So in *Rustel v. Macquister*, Middx. Sittings after H. T. 1807, 1 Camp. N. P. C. 49. n. the plaintiff, having proved the words laid in the declaration, offered evidence of other actionable words spoken by the defendant afterwards; this being objected to on the ground that these latter words might become the subject of a future action, Ld. Ellenborough overruled the objection, observing, that evidence might be given of any words as well as any act of the defendant to shew *quo animo* he spoke the words which were the subject of the action. Still, however, it would be the duty of the judge to tell the jury, that they must give damages for those words only, which were the subject of the action. So per Sir J. Mansfield, in *Finnerty v. Tipper*, Sittings after H. T. 49 G. 3. "In actions for words, it has been allowed to give evidence of words subsequently spoken, for the purpose of shewing that the original words were spoken maliciously and to injure:" but see *Mead v. Daubigny*, Peake N. P. C. 125., where, in an action for slander, Lord Kenyon C. J. confined this doctrine to words not actionable in themselves; admitting, however, that such words might be given in evidence, although it appeared they were not spoken to the same person, to whom the slander was alleged in the declaration to have been spoken. N. This distinction was exploded by Ld. Ellenborough in the preceding case of *Rustel v. Macquister*, who observed that it was not founded upon any principle.

defendant, unless they directly referred to the libel set forth in the declaration.

It is not competent to a defendant charged with having published a libel, to prove that a paper similar to that for the publication of which he is persecuted, was published on a former occasion by other persons, who have never been prosecuted for it^c.

Proof that the libel was contained in a letter^d directed to the plaintiff, and delivered into the plaintiff's hands, is not sufficient proof of publication to maintain *an action* (9).

There having been in a libellous letter a reference to a newspaper^e, as the authority upon which the libel was founded, it was holden, that the newspaper referred to might be given in evidence on the general issue, in mitigation of damages.

Plaintiff declared as proprietor and editor of a newspaper^f; it was proved, that plaintiff was proprietor, but that his *servant* was editor; this was holden to be a fatal variance.

The proceedings against the printers, publishers, and proprietors of newspapers, either civilly or criminally (10), for any libel contained in such paper are much facilitated by a late statute, viz. 38 G. 3. c. 78. by which it is enacted^g, "that no person shall print or publish any newspaper, until an affidavit (or affirmation, in case of a quaker) shall have been delivered at the stamp-office^h, setting forth the real and true names, additions, descriptions, and places of abode, of the printer, publisher, and of *all* the proprietors, if they do not exceed two, exclusively of printer and publisher; if they do, then of two such proprietors, exclusively of

c R. v. Holt, 5 T. R. 436.

d Phillips v. Jansen, 2 Esp. N. P. C. 625. per Kenyon C. J.

e Mullett v. Hulton, 4 Esp. N. P. C. 248. Ellenborough C. J.

f Heriot v. Stuart, 1 Esp. N. P. C. 437.

g S. 1.

h S. 2.

(9) The same point was admitted in Hick's case, in the Star Chamber, Hob. 215. But an indictment or information may be sustained in this case, because such letter being a provocation to a challenge and breach of peace, is considered as a misdemeanor.

(10) The proprietor of a newspaper is answerable criminally as well as civilly for the acts of his servants, in the publication of a libel, although it can be shewn, that such publication was without the privity of the proprietor. R. v. Walter, 3 Esp. N. P. C. 21.

printer and publisher, specifying the amount of shares, the true description of the building wherein such paper is intended to be printed, and the title of such paper¹. If the proprietors exceed two, then two whose proportional shares in the property shall not be less than the proportional share of any other proprietor, exclusively of printer and publisher, shall be named and described in the affidavit or affirmation². This affidavit or affirmation must be renewed as often as printer, &c. shall change their abode or printing office, or as often as commissioners for stamp duties shall require. It must be signed by the parties making it, and taken by a commissioner or person specially appointed by commissioners. It must be sworn by all the parties, if they do not exceed four; if they do, then by four, who shall give notice to the other parties not swearing, under a penalty of 50*l*. *Such affidavits or affirmations shall be filed, and the same, or certified copies thereof, shall, in all proceedings, civil and criminal, touching any newspaper therein mentioned, be received as conclusive evidence of the truth of the matters contained in such affidavit against the persons swearing, and against proprietors named but not sworn* (11), unless such persons shall have delivered to the commissioners, previously to the date of the newspaper in question, an affidavit or affirmation of their having ceased to be printers, &c. of such paper; and by the 11th section it is enacted, that after such affidavit shall be produced in evidence against the persons signing the same, &c., and after a newspaper shall be produced in evidence, entitled in the same manner as the newspaper mentioned in such affidavit; and wherein the name of the printer and publisher, and place of printing, shall be the same, it shall not be necessary for the plaintiff, informant, or prosecutor, or person seeking to recover any

i S. 3. k S. 4.

(11) Before this statute, it had been holden, in the case of *R. v. Topham*, H. 31 G. 3. B. R. 4 T. R. 126., where the defendant was indicted for having published in a newspaper a libel reflecting on the memory of a dead person, that evidence that the paper had been sold at the office of the defendant, that the defendant, as proprietor of the paper, had given a bond to the stamp-office, pursuant to stat. 29 G. 3. c. 50. s. 10. for securing the duties on the advertisements, and that he had from time to time applied to the stamp-office, respecting the duties on the paper, was evidence to be left to the jury, to shew that the defendant was the publisher.

of the penalties given by this act, to prove that the newspaper, to which such trial relates, was purchased at any house, &c. belonging to or occupied by the defendants or their servants, &c., or where they usually carry on the business of printing or publishing such paper, or where the same is usually sold.

The affidavit, together with the production of a newspaper, corresponding in every respect with the description of it in the affidavit¹, is not only evidence of the publication of such paper by the parties named, but is also evidence of its publication *in the county* where the printing of it is described to be.

By the 13th section, certified *copies* of such affidavits, &c. shall be delivered by commissioners, or proper officer, on payment of 1s. A copy of such affidavit, &c. certified to be a true copy, under the hand of commissioners or proper officer, shall, on the proof of hand-writing only, without proving the person signing to be a commissioner or officer, be proof of the swearing, or affirmation and contents, and that it has been sworn or affirmed according to the statute^m. Every printer or publisher must, within six days after publication, deliver a copy of his paper, signed by himself, or his publisher, with his name and place of abode, to commissioner or other officer, and any person may apply for and shall obtain the same at any time within two years from the day of publication, (on giving surety to return it) for the purpose of producing it in evidence in any proceeding civil or criminal.

It was observed in the preceding section, that where the defendant contends that the libel is true, he must justify on record; but where the facts to be proved on the part of the defendant do not constitute a complete justification, as where they shew a ground of suspicion, not amounting to actual proof of the plaintiff's guilt, such facts may be given in evidence, on the general issue, in mitigation of damagesⁿ (12).

¹ *R. v. Hart*, 10 East, 94.
^m S. 17.

ⁿ *Knobel v. Fuller*, Peake's Ev. 297.
Ed. 2.

(12) So in *Sir John Eamer v. Merle*, before Lord Ellenborough, which was an action for words of insolvency, the defendant was permitted to prove that at the time there were rumours in circulation that the plaintiff's acceptances were dishonoured. And in a case before *Le Blanc J.* at Worcester, that learned judge received

evidence under the general issue, that the plaintiff had been guilty of attempts to commit the crime which the defendant had imputed to him. 2 Camp. N. P. C. 253, 254. So in the case of the E. of Leicester v. Walter, 2 Camp. N. P. C. 251, the defendant was permitted to prove, under the general issue, in mitigation of damages, that before and at the time of the publication of the libel, the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that on account of this suspicion, his relations and acquaintance had ceased to associate with him.

C H A P. XXVII.

MALICIOUS PROSECUTION.

- I. *Of the Action on the Case for a Malicious Prosecution, and in what Cases such Action may be maintained.*
- II. *Of the Declaration—Defence—Evidence.*

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- I. *Of the Action on the Case for a Malicious Prosecution, and in what Cases such Action may be maintained.*

AN action on the case lies against any person who maliciously, and without probable cause, prosecutes another, whereby the party prosecuted sustains an injury, either in person, property, or reputation.

The action on the case for a malicious prosecution, bears a strong analogy to the old, and now obsolete, action for a conspiracy; hence, it is frequently termed an action on the case in the nature of a conspiracy^a. But the grounds of the old action for conspiracy are narrow and confined, when compared with those on which the action on the case for malicious prosecution is founded.

The action for a conspiracy having been framed according to the precise terms of a writ in the register, whose limits it does not presume to transgress, lies only in cases where two or more persons maliciously conspire to indict any person falsely of treason or felony^b, who is afterwards *lawfully*

^a *Marsh v. Vaughan* and another, Cro. Eliz. 701. *Mills v. Mills*, Cro. Car. 939.

^b See the opinions of Holt C. J. and

Treby C. J. that a conspiracy lies only for procuring another to be indicted for *treason or felony*, where life was in danger. *Ld. Raym.* 379.

acquitted. The action on the case for a malicious prosecution varies its form as the circumstances of each particular grievance may require. Whatever engines of the law malice may employ to compass its evil designs against innocent and unoffending persons, whether in the shape of indictment or information^c, which charge a party with crimes injurious to his fame and reputation, and tend to deprive him of his liberty; or whether such malice is evidenced by malicious arrests, or by exhibiting groundless accusations merely with a view to occasion expense^d to the party, who is under the necessity of defending himself against them, this action on the case affords an adequate remedy to the party injured. It may be brought against one only^e; and where it is brought against two or more defendants, although a conspiracy be alleged in the declaration, and a verdict be found for all the defendants except one, yet plaintiff will be entitled to judgment^f. On the contrary, the action for a conspiracy must be brought against two persons at the least^g, because the gist of the action is the conspiracy; and if one only be found guilty^h, or if all except one are discharged by matter of lawⁱ, the action fails. And to maintain an action for a conspiracy, the party indicted must have been acquitted upon a good indictment^k by verdict, for such is the language of the writ, "*legitimo modo acquietatus*," or "lawfully acquitted," which imports such an acquittal of the crime charged as will entitle the party to plead *quater foits acquit*, in case he be afterwards prosecuted for the same crime^l. But in an action on the case for a malicious prosecution, it is not necessary that the plaintiff should allege or prove such an acquittal; for it may be brought under circumstances which preclude the possibility of such an acquittal; as, 1st, where a bill of indictment has been preferred and returned *ignoramus*^m. 2dly, Where the indictment has been preferred *coram non judice*ⁿ. And lastly, where the party has been acquitted on a defect in the indictment^o.

Formerly, indeed, it was supposed, that an acquittal on the ground of the insufficiency of the indictment was a

^c Moor v. Shutter, 2 Show. 295.

^d Jones v. Gwynn, Gilb. R. 185. 10 Mod. 148. 214.

^e Mills v. Mills, Cro. Car. 289.

^f Price v. Crofts, Raym. 180. Pollard v. Evans and others, 2 Show. 50. See also Subley v. Mott, 1 Wils. 210.

^g F. N. B. 260. 4to. ed. 1755.

^h 28 Ass. 12. cited in F. N. B. 260.

ⁱ Ib. in notā.

^k Bro. Conspiracie, pl. 23.

^l Gilb. 199.

^m Payn v. Porter, Cro. Jac. 490. Agr. 2 Roll. R. 188.

ⁿ 1 Rol. Abr. 119. pl. 9.

^o Jones v. Gwynn, Gilb. 185. Wicks v. Fentham, 4 T. R. 247.

material objection, where the subject matter of the indictment did not affect the reputation of the party accused, and he had not been imprisoned, because scandal and imprisonment were at that time considered as the only kinds of damage for which this action would lie. But it having been decided in the case of *Savile v. Roberts*^p, that the *expense* incurred by a groundless prosecution, without scandal or imprisonment of the party accused, was sufficient to support this action where the indictment was good, *quoad* the damage; it was shortly afterwards holden, in a case^q where the subject matter of the indictment did not affect the reputation of the plaintiff, and where the only damage which the plaintiff had sustained was the expense attending the prosecution, that this action might be maintained, although the plaintiff had been prosecuted on an insufficient indictment.

The decision of *Savile v. Roberts* has been confirmed by the case of *Smith v. Hixon*, Str. 977. more fully reported in Ca. Temp. Hardw. 54. where it was adjudged, that a husband alone might maintain an action for the malicious prosecution of his wife, the *expenses* of which had been defrayed by the husband. The case of *Jones v. Gwynn* was recognized in *Chambers v. Robinson*, Str. 691. and in *Wicks v. Fentham*, 4 T. R. 247. where it was holden, that this action would lie, although plaintiff had been acquitted on a defect in the indictment, the subject matter of which did not affect his reputation.

The grounds of the action for a malicious prosecution are the malice of the defendant, either express (1) or implied^r.

p Salk. 13. Carth. 416. Ld. Raym. 374. q *Jones v. Gwynn*, Gilb. 185. 10 Mod. 148. 214.

r *Purcel v. Macnamara*, 9 East, 361.

(1) If the indictment be found by the grand jury, the plaintiff must prove express malice, per Holt C. J. Lord Raym. 381. unless the facts lie within the knowledge of defendant. *Parroll v. Fishwick*, Bull. N. P. 14. but in a fuller note of this case, 9 East, 362. n. (b) it appears that this position is hardly warranted. The case was this: in an action for maliciously indicting the plaintiff for perjury, where the indictment was found, and the plaintiff acquitted by verdict, Ld. Mansfield, in summing up, said, it was not necessary to prove express malice, for *if it appeared* that there was *no probable cause*, that was sufficient to prove an *implied* malice, which was all that was necessary to be proved to support this action. For, in this case, all the facts lay in the

want of probable cause² (2), and an injury sustained by the plaintiff, by reason of the malicious prosecution, either in his person by imprisonment, his reputation by the scandal, or in his property by the expense.

By analogy to the action for a malicious prosecution¹, the law in modern times has permitted an action to be maintained for maliciously arresting or holding a party to bail, either where there is not any debt due, or where the party is held to bail for a larger sum than is really due.

¹ Farmer v. Darling, 4 Burr. 1974.

² Admitted in Goslin v. Wilcock, 2 Wils. 305. per Ld. Camden C. J.

defendant's own knowledge, and if there were the least foundation for the prosecution, it was in his power, and incumbent on him, to prove it. Verdict for plaintiff, 50*l.* damages. N. The indictment was for perjury committed on the trial of an action for use and occupation, brought by the defendant against the plaintiff's master.

"Where a person is acquitted by a jury, malice need not be proved at first, on the part of the plaintiff, but it is incumbent on the defendant to shew, on the other side, that there was a probable cause; but where the indictment is quashed, it is necessary for the plaintiff to prove express malice." Per Burnett J. in *Hunter v. French*, Willes, 520.

In *Lilwal v. Smallman*, Hereford Summer Assizes, 1753. MSS. which was an action for maliciously indicting plaintiff for stealing a shovel, value 11*d.*; it was objected that express malice had not been proved. Foster J. overruled the objection, observing, that where the indictment is for felony, defendant cannot object that express malice is not proved; but on indictments for misdemeanors, evidence of express malice must be given.

(2) In *Inclendon v. Berry*, Devonshire Summ. Ass. 1805, in an action for maliciously indicting plaintiff for perjury, Lens, Serj. for the plaintiff, having proved express malice, contended, that it was not necessary for him to proceed any further, and that it lay on the defendant to shew probable cause for having instituted the prosecution; but Le Blanc J. ruled, that some evidence (though slight evidence would be sufficient) must be given *on the part of the plaintiff* of want of probable cause, before the defendant could be called upon for his defence.

"The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable or not probable are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law." Per Lord Mansfield C. J. and Lord Loughborough C. J. in *Sutton v. Johnstone*, 1 T. R. 545. See post. *Golding v. Crowle*, p.

As in the analogous action for a malicious prosecution it must appear that the prosecution is determined^a, so in the action for a malicious arrest it must be stated in the declaration, that the first action has been determined.

To support this action, malice, and that the arrest was without probable cause, must be alleged and proved.

A., to whom a sum of money was owing from B.^x, sued out a writ against B. for the purpose of holding him to bail; before the writ was served, B. went to the house of A. and paid the debt, but A. did not immediately after such payment countermand the writ, in consequence of which B. was arrested and kept in prison for several hours; B. thereupon brought an action against A., alleging, that after payment of the debt it became the duty of A. to have countermanded the writ, and that he had wrongfully neglected so to do, by reason whereof he was arrested; it was holden, that the action would not lie; Eyre C. J. observing, that the plaintiff ought to have inquired at the time when he paid the debt, whether any writ had been sued out, and offering to pay whatever costs were incurred thereby, to have requested a countermand, which he might take to the sheriff. And Heath J. said, "This action is founded on mere non-feasance, and no case or precedent has been cited to shew, that such an action was ever maintained. All the cases of arrest and holding to bail without cause, are founded on malice."

In like manner it has been holden^y, that evidence of suing out a writ and arresting a party thereon, after the debt has been discharged and a receipt given, will not be sufficient to maintain an action of this kind in a case where actual malice was not proved, and the facts of the case precluded any inference of malice.

An action on the case may be maintained for maliciously impleading and causing the plaintiff to be excommunicated in the Ecclesiastical Court^z, whereby he was taken upon an *excom. cap.* and imprisoned, until he procured himself to be absolved.

The plaintiff declared^a, that the defendant had sued out a *fi. fa.* upon a judgment given against the plaintiff for the defendant, in an action of trespass, under which the sheriff took goods of the plaintiff to the value of the damage, and

^a *Parkerv. Langley*, Gilb. R. 163. Adjudged on special demurrer.

^x *Scheibel v. Fairbain*, 1 Bos. & Pul. 388.

^y *Gibson v. Chaters*, 2 Bos. & Pul. 129.
^z *Hocking v. Matthews*, 1 Vent. 86.

^a *Waterer v. Freeman*, Hob. 205. 266.
1 Brownl. 12.

returned that the goods remained in his hands for want of purchasers, and that the defendant, *well knowing this*, to the intent to vex the plaintiff, sued out another *fi. fa.* under which the sheriff levied the money of other goods of the plaintiff, and paid it over to the defendant. After not guilty pleaded, and verdict for plaintiff, it was holden, on motion in arrest of judgment, that the action was maintainable; Hobart C. J. (who delivered the opinion of the court) observing, that the plaintiff was twice vexed *wilfully* by the defendant, who had first one execution inchoate, which he ought to have completed, *knowing it*, and not to have taken another; for else he might take twenty executions.

So an action will lie for falsely and maliciously suing out a commission of bankruptcy against the plaintiff^b, which was afterwards superseded (3); and in such action it cannot be objected, at least after verdict, that it is not averred in the declaration, that the plaintiff had not at any time committed an act of bankruptcy.

But an action will not lie against a person^c exhibiting an information for intention to land goods without paying duty, if the goods are condemned by the sub-commissioners, though the commissioners of appeal reverse the condemnation.

Where a justice of the peace maliciously grants a warrant against another^d, without any information, upon a supposed charge of felony, the remedy against the justice is by an action of trespass *vi et armis*, and not by action on the case (4).

A. a captain in the navy, was accused by his commander in chief of neglect of duty, disobedience of orders, &c. A. having been tried by a court martial, was honourably acquitted; after which he brought an action in the Court of

^b *Chapman v. Pickersgill*, 2 Wils. 145. ^d *Morgan v. Hughes*, 2 T. R. 225.

^c *Reynolds v. Kennedy*, 1 Wils. 232.
on error from Ireland.

(3) For another remedy in this case, see *Smith v. Broomhead*, ante, p. 221.

(4) "Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other." Per Ashhurst J. S. C.

Exchequer, against his commander, for a malicious prosecution. A verdict having been found for the plaintiff, a motion was made in arrest of judgment, which, after a very elaborate discussion was refused^e; but the defendant afterwards brought a writ of error in the Exchequer Chamber, where the judgment of the Court of Exchequer was reversed^f. This reversal was afterwards affirmed in the House of Lords^g.

An action will not lie to recover damages^h sustained by the plaintiff in defending a vexatious ejectment brought against him by the defendant, in which the nominal plaintiff has been non-prossed (5).

II. Of the Declaration—Defence—Evidence.

THE declaration must state all the material circumstances attending the malicious prosecution, and how it was disposed ofⁱ; because, until that be determined, it cannot be known whether the prosecution were malicious or not^k, and this absurdity might follow, that plaintiff might recover in the action, and yet be afterwards convicted on the original prosecution (6).

Care must be taken in framing the declaration, so as to avoid any objection being raised on the ground of a variance. For where in the declaration it was stated, that the trial, and the acquittal, both took place "in the court of our lord the king, before the king himself"; and upon the production of the record in evidence, it appeared, that the trial was before the chief justice, at nisi prius, and that the acquittal was by the judgment of the court in bank,

^e *Sutton v. Johnstone*, 1 T. R. 501.

^f *ib.* 550.

^g 1 Bro. P. C. 76. Tomlins's Ed.

^h *Parton v. Honnor*, 1 Bos. & Pul. 205.

ⁱ *Arundell v. Tregonoe*, Yelv. 116.

^k *Lewis v. Farrell*, Str. 114. *Parker v. Langley*, Gilb. R. 163.

(5) Under what circumstances an action will lie for a malicious and vexatious *suit*, see notes on Co. Litt. 161. a. (4) IV. and *Martin v. Lincoln*, M. 27 Car. 2. C. B. Bull. N. P. 13.

(6) The want of this averment is cured by verdict. *Skinner v. Gunton*, 1 Saund. 228. because it will be presumed, that it has been proved at the trial. Per Denison J. in *Panton v. Marshall*, B. R. M. 28 G. 2. MSS.

the variance was holden to be fatal¹. But where the allegation was, "that the plaintiff, by a jury of the county of _____, was duly and in a lawful manner acquitted," and by the record it appeared, "that the *jury* found the plaintiff *not guilty*, and upon that verdict the *judgment* of the *court* was, that the plaintiff should go thereof acquitted;" it was holden sufficient, by construing the words *reddendo singula singulis*, that the plaintiff was *duly acquitted by the jury*; that is, found not guilty of the facts, and in a *lawful manner acquitted*; that is, by the judgment of acquittal pronounced by the court².

If it appear on the face of the declaration, that the court in which the indictment was tried had authority to hear and determine upon it, it is sufficient; and there is not any necessity for copying exactly the style of the record; but if the declaration describe a court of incompetent authority, it is bad. This distinction may be illustrated by the following case: the declaration stated plaintiff to have been indicted at the general *quarter sessions*³, and by the record it appeared, that he had been indicted at the general *sessions*; the word *quarter* was rejected as surplusage, because plaintiff had been indicted for an offence cognizable at the general sessions; but if the offence had been cognizable only at the *quarter sessions*, the declaration would have been bad.

So where it was stated in the declaration⁴ that the plaintiff had been indicted as a common barretor before certain justices, *ad felonias, &c. nec non ad pacem conservandam assignat*: and defendant having demanded oyer of the indictment, it was certified to have been taken before certain justices *ad pacem conservandam assignat*; it was holden that the action lay, on the ground that the justices mentioned in the indictment, were not justices of another nature or power than those which were mentioned in the declaration; both were justices of the peace, and such as had power to receive such manner of indictment. It was admitted, however, if the declaration had mentioned justices of assize, and the certificate had been of a thing taken before justices of gaol delivery, the variance would have been fatal, for they are distinct in power.

¹ Woodford v. Ashley, 11 East, 508.
² Hunter v. French, Willes, 517.

³ Busby v. Watson, 2 Bl. 1050.
⁴ Barnes v. Constantine, Yelv. 46.

Defence.

The usual defence to this action is, that the defendant had reasonable or probable grounds of suspicion against the plaintiff. It is not necessary, that these grounds should be legal grounds; for if it can be inferred, from the circumstances of the case, that the defendant was not actuated by any improper motives, but an honest desire to bring a supposed offender to justice, it will be a sufficient answer to this action^p; because such circumstances tend to disprove that which is of the essence of the action, viz. the malice of the defendant in preferring the charge. Formerly, it was usual for the defendant to plead a justification of this kind, specially; but the modern practice is, to give it in evidence under the general issue.

If the plaintiff prove malice^q, yet if the defendant shew a probable cause, he shall have a verdict, and the judge, not the jury, is to determine whether he had a probable cause; and, therefore, where the plaintiff having brought an action against the defendant for a malicious prosecution for perjury, obtained a verdict; upon a motion for a new trial the court set it aside, (it appearing upon the report of the judge that there was a probable cause) not as a verdict against evidence, but as a verdict against law.

This is an action on the case, and consequently if it be not brought within six years next after the cause of action, the statute of limitations^r may be pleaded in bar.

Evidence.

The plaintiff must produce an examined copy of the record of the indictment, and where there has been a verdict of not guilty, of the acquittal.

Among the orders and directions to be observed by justices of the peace at the sessions in the Old Bailey, 26 Ch. 2. prefixed to Kelyng's Report of Crown Cases, ed. 1708, is the following order, viz.

“That no copies of any indictment for *felony* be given without special order, upon motion made in open court at the general gaol delivery; for that the late frequency of actions against prosecutors, which cannot be without copies

^p Coxe v. Wirrall, Cro. Jac. 193.

^q Golding v. Crowle, M. 25 G. 2. B. R.

Bull. N. P. 14. Say. R. 1. S. C.

^r 21. Jac. 1. c. 16.

of the indictments, deterreth people from prosecuting for the king upon just occasions (7)."

In *Evans v. Philips*, Monmouth Sum. Ass. 1763. MSS. Adams, Baron (who had been recorder of London for several years), said, that in all cases of indictments for misdemeanor, the party is entitled to a copy of the record; but in cases of indictment for *felony*, he should look upon the copy as a surreptitious record, and not pay any regard to it, unless the judge had been applied to, and had ordered a copy.

This case, however, was overruled in *Legatt v. Tollervey*, 14 East, 302, where it was holden, that the record of the indictment for felony or a true copy must be received in evidence, although it does not appear, that the officer producing the record, or giving the copy, had any authority from the court, or any fiat from the attorney general for that purpose.

The distinction between felony and misdemeanor was taken by Lord Mansfield C. J. in *Morrison v. Kelly*, B. R. Middx. Sittings after Trin. T. 2 Geo. 3. 1 Bl. R. 385. That was an action for a malicious prosecution, in indicting plaintiff for keeping a disorderly house. To prove the fact, the clerk of the peace for the Westminster sessions attended with the original record of the acquittal. Norton objected, that there ought to be a copy of the record granted by the court before which the acquittal is had, in order to ground an action for a malicious prosecution. But, per Lord Mansfield; although this is necessary where the party is indicted for *felony*, yet the practice is otherwise in cases of misdemeanor.

There is a short note in *Strange's Reports*, from which it appears to have been the opinion of Lee C. J. that if the copy of the indictment has been granted by order of court, it is sufficient, although it was not granted to the plaintiff in the action for malicious prosecution, or at his instance.

The plaintiff and another were indicted at the Old Bailey sessions for forgery, and acquitted, and a copy of the indictment granted to the other only. In this action, which

^a *Jordan v. Lewis*, Str. 1122. 14 East, 805. n. S. C. from Mr. Ford's MS. See also Str. 856.

(7) "If A. be indicted for felony and acquitted, and he is desirous of bringing an action, the judge will not permit him to have a copy of the record, if there was probable cause for the indictment, and he cannot have a copy without leave." Per Holt C. J. *Ld. Raym.* 253.

was for a malicious prosecution, the plaintiff offered the copy in evidence, and the order at the Old Bailey was read by way of objection. But the chief justice (Lee) said, he could not refuse to let the plaintiff read it (the copy of the indictment); *for an order was not necessary to make it evidence, nor is it ever produced in order to introduce it.* So the copy of the indictment was read, and a verdict obtained for the plaintiff, which the court refused to set aside.

This action cannot be maintained without proof of malice, either express or implied. Malice may be implied from the want of probable cause, but that must be shewn by the plaintiff. Proving an acquittal for want of prosecution, is not *prima facie* evidence of malice to support this action.

In an action for a malicious prosecution against the defendant for having indicted the plaintiff of perjury, the proof on the part of the plaintiff (in addition to the formal proof of the record of acquittal) was, that after the indictment found was ready for trial, the prosecutor (the present defendant) was called, and did not appear; on which the verdict of acquittal passed. *Ld. Ellenborough C. J.* thought that this was not sufficient to support the action, without evidence of express malice, or at least of circumstances evincing such entire want of probable cause, whence malice was to be presumed, and therefore he nonsuited the plaintiff. The court of *B. R.* afterwards concurred in opinion with the *C. J.* *N.* The indictment assigned the perjury on an affidavit made by the plaintiff swearing to words uttered by the defendant.

It must appear that the plaintiff was acquitted upon the prosecution^x, *before* the action was brought; but the day of the acquittal is not material. Hence, where it was stated in the declaration, under a scilicet, that the acquittal took place on the morrow of the Holy Trinity, (which allegation was not accompanied with a prout patet per recordum) and by the record when produced in evidence, it appeared that it took place on Tuesday next after Easter Term; the latter day having been before action brought, the variance was holden to be immaterial, on the ground that the day

^t *Legatt v. Tollervey*, 14 East, 302.
S. P.

^z *Purcell v. Macnamara*, 9 East, 361.

^x *Purcell v. Macnamara*, 9 East, 157.
in which *Pope v. Foster*, 4 T. R. 590.
was overruled. See also *Woodford v. Ashley*, 2 Camp. N. P. C. 194.

mentioned in the declaration was not alleged as part of the description of the record of acquittal (8).

In an action on the case for a malicious prosecution⁷, where there was not any person present at the time when the supposed felony was committed, except defendant's wife; Holt C. J. allowed the evidence of the wife, given at the trial of the indictment, as good evidence to prove a felony having been committed.

In an action on the case for maliciously indicting plaintiff and others for a conspiracy⁸, the counsel for the plaintiff called one of the grand jury, before whom the bill of indictment had been preferred, and found a true bill, to prove that the defendant was the prosecutor of the indictment. Garrow, for the defendant, objected to his being examined, observing, that the grand jurymen could collect this circumstance of defendant's having been the prosecutor, from the testimony only which had been produced before him in his character of grand jurymen, and which by his oath he was bound not to disclose; but Kenyon C. J. thought that the question of "who was prosecutor of the indictment?" was a question of fact, the disclosure of which did not infringe upon the grand jurymen's oath, and therefore permitted him to be examined as to that point.

Case for malicious prosecution of an indictment⁹, whereof (as was alleged) plaintiff was *legitimo modo acquietatus*; upon the trial it appeared, that he was acquitted no otherwise than by an entry of a *nolle prosequi*. *Per cur.* "This evidence does not support the declaration; for the *nolle prosequi* is a discharge as to the indictment, but it is not an acquittal of the crime.

⁷ Johnson v. Browning, 6 Mod. 216. ⁸ Goddard v. Smith, Salk. 21. 6 Mod.
⁹ Sykes, gent. one, &c. v. Dunbar, 261. S. C.
 Middlesex sittings, after M. T. 40
 G. 3. Kenyon C. J. MSS.

(8) "There are two sorts of allegations; the one of matter of substance, which must be substantially proved; the other of description, which must be literally proved." *Per* Ld. Ellenborough C. J. S. C. "Where the day laid is made part of the description of the instrument referred to, which instrument is necessary to be proved, the day laid must be proved as part of that instrument. But where the day laid is not material in itself, and need not have been proved as laid, supposing the proof to have been by parol, if the fact proved will support the declaration, I see no ground for any distinction between making such proof by matter of record or by parol." *Per* Lawrence J. S. C. 9 East, 162.

CHAP. XXVIII.

MANDAMUS.

- I. *Nature of the Writ of Mandamus.*—*Mandamus to restore or admit Persons to corporate Offices—Stat. 11 G. 1. c. 4. for preventing Inconveniences arising for want of electing Mayors, &c, on the Charter-day.*
- II. *In what other Cases the Court will grant a Mandamus.*
- III. *Where not.*
- IV. *Form of the Writ.*
- V. *Of the Return.*
- VI. *Of the Remedy, where the Party to whom the Writ of Mandamus is directed, does not make any Return, or where he makes an insufficient, or false Return.*

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- I. *Nature of the Writ of Mandamus.*—*Mandamus to restore or admit Persons to corporate Offices—Stat. 11 G. 1. c. 4. for preventing Inconveniences arising for want of electing Mayors, &c. on the Charter-day.*

THE writ of mandamus is a prerogative writ, containing a command, in the king's name, and issuing from the court of King's Bench, directed to persons, corporations, or inferior courts of judicature within the king's dominions, requiring them to do a certain specific act, as being the duty of their office, character, or situation, agreeably to right and justice. This writ affords a proper remedy, in cases where the party has not any other means of compelling a specific performance.

The object of the writ is not to supersede legal remedies, but only to supply the defect of them. The only proper ground of the writ is a defect of justice. It is the absence, or want, of a specific legal remedy, which gives the court jurisdiction^a. There must, however, be a specific legal right^b, as well as the want of a specific legal remedy, in order to found an application for a mandamus. The power to issue this writ belongs exclusively to the court of King's-Bench, and is considered as one of the flowers^c of that court; but this power ought to be exercised with great caution, as a writ of error does not lie on this proceeding. A mandamus lies either to restore a person wrongfully ousted, or to admit a person wrongfully refused.

A mandamus lies to restore a person who has been removed from his office without cause; as a mayor, bailiff^d, alderman^e, Burgess^f, jurat^g, common council-man^h, recorderⁱ, town-clerk^j, or serjeant^k. Antiently, in these cases, the writ was termed "a writ of restitution," and appears to have been confined exclusively to offices of a public nature. The title "mandamus," is not found in the old abridgments. By an extension of the antient writ of restitution, a remedy has been provided for persons who have been duly elected to offices, although they never had possession. Hence a mandamus lies to *admit*, as well as to restore, a person to his office, as a mayor, alderman^m, town-clerkⁿ, &c. (1).

a Per Lord Ellenborough C. J. Bristol Dock Company, M. 52 G. 3. MS.

b Per Lord Ellenborough C. J. R. v. Archbishop of Canterbury, 3 East, 919.

c Poph. 176.

d 2 Rol. Abr. tit. Restitution, pl. 4.

e Shuttlesworth v. Corporation of Lincoln, 9 Bulstr. 132. Taylor's case, Poph. 133. S. P.

f Clerk's case, Cro. Jac. 506. See also 5 Mod. 267.

g Anon. 1 Lev. 148.

h 2 Rol. Abr. tit. Restitution, pl. 8.

i Ib. pl. 6.

k Pasch. 2 Car. said to have been adjudged. See Sty. 457.

l 2 Rol. Abr. tit. restitution, pl. 7.

m Com. Dig. Mandamus (A.).

n Awdley v. Joye, Poph. 176.

(1) The admission under the mandamus gives no right, but only a legal possession, to enable the party to assert his right, if he has any. Hence, *non fuit electus* has been holden not to be a good return to a mandamus, to swear in a church-warden; (R. v. White, M. 11 Geo. 3. cited by Strange Arg. Str. 894, 5.) because it is directed only to a ministerial officer, who is to do his duty, and no inconvenience can follow; for if the party has a right, he ought to be admitted; if he has not, the admission will do him no good. Wherever the officer is but ministerial, he is to execute his part, let the consequence be what it will. R. v. Simpson, M. 11 Geo. ib. That was a mandamus to the archdeacon of Colchester, to swear Rodney

By the common law, upon the death of a mayor, or other chief magistrate of boroughs or corporations within the year, the court of King's Bench was authorised to grant a mandamus immediately to fill up the vacancy, thus occasioned by the act of God and an ordinary contingency; but, upon an omission to elect at the charter-day, or to do such acts as were by the charter required to be done at certain times, in order to complete the election, or upon the removal of an officer unduly chosen, the court had not any power to compel an election, or the performance of such acts as were necessary to complete an election, before the day came round again; for, to compel the corporation to proceed to an election at another day, would not be enforcing obedience to the king's charter, but to authorise them to act in opposition to it. The omission to elect might be owing to the contrivance of the person who ought to hold the court, or to preside in the assembly where the election was to be made; or it might be the effect of pure accident: in either case, the inconvenience was the same; a forfeiture of the charter might be incurred, and the corporation dissolved, in consequence of such omission. To remedy the mischiefs which might thus arise, it was enacted, by stat. 11 Geo. 1. c. 4. that if no election should be made of the mayor, bailiff, or other chief officer of any city, borough, or town corporate in England, Wales, and Berwick-upon-Tweed, upon the day, or within the time appointed by the charter or usage, or if such election having been made, should afterwards become void, whether such omission, or avoidance should happen through the default of the officer, &c., or by any accident, or *other means*, the corporation should not be thereby dissolved, but might meet at the town-hall, or other usual place of meeting, on the day after, between the hours of ten in the morning and two in the afternoon (2), and proceed to an election; and in case the mayor, or other person who ought to hold the court, or pre-

Fane into the office of churchwarden. The archdeacon returned, that before the coming of the writ, he received an inhibition from the bishop; but the court held that was no excuse, and that a ministerial officer is to do his duty, whether the act would be of any validity or not.

(2) " I think the time is not essential, but only directory. It was appointed to prevent surprise; and if the election be *fairly* carried on, though at a different hour, yet such election is good." Per *Ld Hardwicke*, Ch. Ju. in *R. v. Pole*, B.R. Trin. 7 and 8 G. 2. MS.

side at the assembly, shall be absent, the nearest in place or office, having a right to vote, shall hold the court and preside. And in case^a no election shall be made upon the day, or within the time appointed by the charter or usage, or in pursuance of the foregoing directions, the court of King's Bench may award a mandamus, requiring the members or persons having a right to vote, or to do acts necessary to be done, in order to an election, to assemble themselves at a time prefixed in the writ, and to proceed to election, and to do the requisite acts, or to signify to the court good cause to the contrary. In cases^b where the mayor, &c. is to be nominated, elected, or sworn, at a court-leet, or other court, and by contrivance of the lord, steward, or other officer, or by accident, in not holding such court, no due nomination, &c. is made, the court of King's Bench may award a mandamus, requiring the lord, &c. to hold such court, and to do such acts as are necessary for such nomination, &c.

Mayors^c, &c. elected in pursuance of this act, are to take the oaths required upon admission, before the officer presiding at such election, who is authorized to administer them. But the election will not be valid^d, unless as great a number of persons are present at, and concur in, the election, as would have been necessary in case the same had been made upon the charter-day, &c.

Mayors^e, &c. voluntarily absenting themselves from, or knowingly and designedly preventing the election of any other mayor, &c. upon the charter-day, &c., shall, upon conviction, suffer six months imprisonment, and be forever disabled from taking any office. Lastly, the persons^f to whom the mandamus is directed, are to make their return to the first writ.

Such are the enactments and provisions of the stat. 11 Geo. 1. c. 4., which, as it is a remedial law, is to be expounded in the most liberal sense that the words are capable of⁽³⁾. Hence, the court will grant a mandamus under this statute, to compel the members of a corporation to proceed to the

• S. 2.
p S. 3.
q S. 4.

r S. 3.
s S. 6.
t S. 9.

(3) "This being a remedial law, to prevent the inconveniences that may arise, by any accident, from non-elections, if the parliament uses such words in an act that will take in other cases within the same mischief, the court ought to construe such kind of acts as liberally as possible." Per Lord Hardwicke, C. J. in *R. v. Pole*, *sup.*

election of a mayor, although more than one year, e. g. three or four years, have elapsed, since a regular election^a.

The statute is not confined to annual officers. Hence, where by the charter it was directed, that upon the death, removal, or amotion of a burgess, it should be lawful for the mayor and burgesses, within *eight days next following the death, &c.*, to meet and nominate an inhabitant of the borough to be a burgess during life—the eight days after a vacancy having elapsed, without filling up the same, it was holden^a, that although the burgesses were appointed for life, yet the statute authorised the court to grant a mandamus.

In like manner it has been holden, that the words in the first section of the statute, “no election” are to be construed “no legal election;” and consequently although there has been an election, *de facto*, the court has a discretionary power, upon considering all the circumstances of the election, to award or not to award a mandamus, as the justice of the case may require^a. If the legality of the election *de facto*, be doubtful, and fit to be tried by information in nature of *quo warranto*, the court will not award a mandamus^a; but if it appear clearly that the election was illegal, or a merely colourable and void election, the court will grant a mandamus^a; for in such case it would be nugatory to try the legality of the election in an information in the nature of *quo warranto*. And the court will grant a mandamus, not only for the head officer, but also for others who are necessary constituent parts of the corporation^b.

In the following case^c the construction of the foregoing statute underwent considerable discussion. *Quo warranto* to try defendant's right to be mayor of Grampound, in Cornwall. Grampound is a borough by prescription; and according to the custom of the place, the mayor is to be elected on a particular day, and to be sworn into his office by the steward, at the next court-leet. The mayor neglecting to hold an assembly for the choice of a new mayor, one Pierce, a capital burgess, and the next presiding officer, together

^a R. v. Burgesses of the Borough of Orford, M. 9 G. 2. MS. Bull. N. P. 201. 34 MS. Serjeant Hill, p. 263. S. C. there said by the court, that the Corporation of Macclesfield, Trin. 11 G. 1. was an authority in point.

^x R. v. Mayor and Burgesses of Thetford, 8 East, 270.

^y R. v. Newsham, Say. R. 211. Borough of Carmarthen.

^z R. v. Banks, H. 4 G. 3. 3 Burr. 1453. Borough of Corfe Castle. R. v. Mayor of Colchester, 28 G. 3. 2 T. R. 259.

^a R. v. Mayor of Bossiney, alias Tintagel, H. 8 G. 2. MS. S. C. shortly reported, Str. 1003. Bull. N. P. 201. cited in R. v. Banks, 3 Burr. 1454. Case of Aberystwith, Trin. 14 G. 2. Str. 1157. Corporation of Scarborough, Hil. 16 G. 2. Str. 1180. R. v. Newsham, Borough of Carmarthen, E. 28 G. 2. Say. 211. R. v. Mayor of Cambridge, H. 7 G. 3. 4 Burr. 2008.

^b Corporation of Scarborough, Str. 1180.

^c R. v. Nance, B. R. Trin. 14 and 15 G. 2. MS.

with the defendant Nance, held an assembly the day following for that purpose. And two capital burgesses being, according to the custom of the place, to be named by the capital burgesses, out of which the commonalty are to choose one to be mayor for the year ensuing, Nance and Pierce put each other in nomination; and Nance being elected by the commonalty, Pierce in a few days afterwards swore him in. Upon this record there were several issues in fact joined, which were tried at the assizes in Cornwall, and found for the defendant. And to the point of swearing before Pierce, there was a demurrer; and on the demurrer the single question was, whether upon the stat. 11 G. 1. c. 4. the right of swearing the new mayor devolved upon the presiding officer, as well as holding the assembly for his election; because, though the old mayor had been guilty of a default at the customary day, yet the lord of the leet had not, and might, for aught appears, have sworn in the new mayor at the proper time. After the case had been argued several times, Lee C. J. delivered the resolution of the court thus: "We are all of opinion that the defendant was well sworn. In this statute are several clauses making provision for particular cases. The first gives a remedy where a mayor or other chief officer shall not be chosen on the charter, or customary day, and there the next presiding officer is enabled to hold a court the day following, and to do all such acts for completing the election as the mayor or other chief officer ought to have done on the proper day. The next empowers this court to grant a mandamus where no election is had on the second day. The third provides for nominations, elections, and swearing, to be had in courts leet. This comprehends two cases; one, where the nomination, or election, is to be out of the leet, and is properly done on the charter, or customary day, but the swearing is to be at the leet; the other, where the nomination is to be in the leet, and then the whole is to be perfected in the same manner as if done the day next following the charter or customary day. Here is no provision about swearing in the leet, where the nomination and election are to be out of it, and are made by a devolution to the next officer, after the regular day. The fourth is a general clause relating to the swearing, and gives the person entitled to hold the assembly under the act, the power to swear in the party elected. And by this clause we think Pierce was well authorised to swear the defendant, there being nothing in the statute to preserve the right of the leet, where the mayor is to be elected out of it, and is elected after the charter or customary time. It has been objected, that the mayor, on the proper day, could not have

sworn in his successor, and that the presiding officer is only entrusted with the power of the mayor. But we think more is delegated to him, and that he has an absolute authority to complete the election. It was likewise objected, that the lord of the leet ought not to be deprived of this franchise without some fault in him. To which it may be answered, that if an election was not made on the regular day, it was doubtful before the statute, whether it could be made afterwards; and as this arose often from the neglect of lords, the parliament had little regard to this franchise, and therefore gave a new method of electing and swearing officers, by which corporations might speedily be furnished with regular magistrates. Lastly, it was objected, that the swearing was some days after the election. But this is not material, as he was sworn before he entered on the execution of his office; and, therefore, on this point judgment was given for the defendant."

The last objection was again agitated in a late case of the *King v. Courtenay*^d, where the swearing in of a burgess was more than two years after his election; but the court held, that where the person elected has a present capacity of being sworn in at the time of his election, his title cannot be impeached on the ground of a mere omission to complete the election by an immediate swearing in; thereby distinguishing this case from the case of *R. v. Carter*^e, (which had been relied on in the argument) where the court held, upon the words of the charter incorporating the borough of Portsmouth, that the defendant, who had been elected a burgess, when an infant under six years of age and sworn in after he had attained his age of 21, was not duly elected (4). It was observed, however, by Lord Ellenborough in *R. v. Courtenay*, that the neglect to be sworn in for a great length of time, as above 20 years after election, might (as in the case of the *King v. Jordan*^f.) be deemed a waiver or refusal to accept the election by the party elected, but did not vitiate the election itself; for otherwise the question of waiver could not have arisen in that case.

^d 9 East, 246.

^e Cowp. 220.

^f C. T. H. 255.

(4) The question, whether an infant was capable of exercising the office of burgess, was discussed in *R. v. White*, B. R. M. 7 G. 2. MS. where the court granted an information on this ground only; observing, that as an infant could only bind himself for necessities, it would be very strange if he could be entrusted with any public office.

Where a person has been elected mayor of a corporation, who is disqualified on account of not having taken the sacrament within one year next before the election, the court, upon receiving competent information of this fact, will grant a mandamus to the electors to proceed to a new election, under the preceding statute, as if no election had been made^g.

An election completed after the departure of the presiding officer, who forms an integral part of the elective assembly, is void^h.

An assembly was regularly convened for the purpose of nominating and electing a new mayor, over which the then mayor presided. He declared, that the persons, with whom the nomination rested, were equally divided, and consequently that no election could be made; and thereupon he directed proclamation to be made for dissolving the assembly. No objection was made to this, nor did any persons give notice, that they meant to proceed to make an election. But when the mayor was gone away, and a number of the burgesses also departed, considering the assembly as dissolved, the rest proceeded to make an election. It was holdenⁱ, that this election could not be supported; for assuming it to be clear (though the point had never been judicially decided) that an election begun under one presiding officer, could be completed under another, yet this was not a continuation of the business begun before the mayor, but an attempt to continue that which had been concluded. Considering, also, the case upon the statute, and that if the mayor absent himself, the next in place and order present may preside; yet here the mayor did not absent himself, but did preside, and as presiding officer determined upon the validity of the votes, that they were equal, and that no election could be had, and then dissolved the assembly; and all this without any objection made at the time; and in consequence of such dissolution of the assembly, unobjected to as it appeared, many of the freemen went away, and then the rest of them made the election in question: this was not an election within the aid of the statute, which never meant to protect elections made by surprise and fraud.

^g R. v. Corp. of Bedford, 1 East, 79.
^h R. v. Buller, 8 East, 399.

ⁱ R. v. Gaborian, 11 East, 77.

II. *In what other Cases the Court will grant a Mandamus.*

HAVING enumerated the most important cases relating to corporations in which the court will interpose by granting a mandamus, I shall proceed briefly to state some other cases in which this remedy may be obtained.

The circumstance of the office being subject to the Ecclesiastical Court, affords no objection. Hence, writs of mandamus have been granted to admit prebendaries^k, an apparitor general^l, parish clerks^m, and sextonsⁿ. So to admit scavengers^o, &c.; to restore a schoolmaster of a grammar-school founded by the crown^p; so to restore a member of an university, who had been improperly suspended from his degrees^q. In like manner a mandamus will lie to compel a dean and chapter to fill up a vacancy among canons residentiary^r; so to the Ecclesiastical Court^s, to swear churchwardens elected by the parish; so to grant the probate of a will to an executor^t. So a mandamus lies to the judge of the Prerogative Court of Canterbury to grant administration to the husband, of the wife's estate, when the husband has done nothing to depart from his right^u. In the case of *R. v. Windham*^x, the court granted a mandamus to compel the warden of Wadham College to affix the common seal of the college to an answer of the fellows, &c. in Chancery, although the warden disapproved of the answer of the fellows, and had put in a separate answer.

A mandamus will lie to J. P. to nominate overseers of the poor, although the time mentioned in the stat. 43 Eliz. has expired; because the statutes for the relief of the poor are to be construed liberally^y. So to sign and allow a poor's rate; and in this case they will grant the mandamus in the first instance, and not a rule to shew cause; for otherwise the poor might starve^z.

k *R. v. Dean of Norwich*, Str. 159.

l *Folke's case*, cited per Cur. in *R. v. Ward*, Str. 897.

m *R. v. Warren*, Cowp. 371.

n *R. v. Churchwardens of King's Clere*, 2 Lev. 18. 1 Vent. 143. 8.C. N. It appeared by the certificate of the minister and several parishioners, that the sexton was an officer for life, and received two-pence from every house yearly as wages. But in the same term it was granted for another sexton, without such certificate.

o Said per Cur. in *Ile's case*, 1 Vent. 143. to have been granted. See also 2 T. R. 181.

p *R. v. Bailiffs of Morpeth*, Str. 58.

q *R. v. U. of Cambridge*, T. 19 G. 3. Dr. Ewin's case.

r *Bishop of Chichester v. Harward*, 1 T. R. 652.

s *Anon.* 1 Vent. 115.

t 1 Vent. 335.

u *R. v. Bettesworth*, Str. 891-1118.

x Cowp. 377.

y *R. v. Sparrow*, Str. 1123.

z *R. v. Fisher*, Say. R. 160.

Although it was formerly doubted whether a mandamus would lie to a lord of a manor to admit a copyholder, yet in *R. v. Rennett*^a, where application was made for a mandamus to the steward of a manor, to admit a person who claimed as heir at law to a customary estate within the manor, the court said, they had no doubt but that a mandamus ought to be granted, to compel a lord of a manor to admit a copyholder, if a proper case were laid before them; but as the party making this application claimed by descent, it would not answer any purpose to grant the mandamus, since he had as complete a title without admittance as with it, against all the world but the lord. See also *R. v. Lord of the Manor of Hendon*^b, where a mandamus was granted to the lord, who had refused to admit the surrenderee of a copyhold estate on account of a disagreement respecting the fine to be paid; the court observing, that they would not give an opinion respecting the lord's fine on an application by a tenant for a mandamus to be admitted, because the lord had not any right to the fine until admittance. See also *R. v. Coggan*^c, where a mandamus was granted to the lord and steward of a manor to admit a person to a copyhold tenement, who had a *prima facie* legal title, in order to enable him to try his right, though a court of equity had before refused to compel the lord to admit him for want of his shewing an equitable right to the property; Lord Ellenborough, C. J. observing, that he was aware that the power of the Court of King's Bench to grant a mandamus to admit to a copyhold, had been questioned on the other side of the hall, yet the court having for many years past been in the constant habit of granting such writs, upon a sufficient *prima facie* title made out on the part of the person applying, he could not doubt their power in this respect. N. There being a claim of a previous fine due to the lord in respect of the ancestor from whom the party claimed, the rule for a mandamus was granted upon the party's undertaking to pay such fine or fines as should be due to the lord. It makes no difference by what mode the party becomes entitled to the franchise, whether by charter, prescription, or tenure; therefore, where by the custom of the borough of Midhurst, the jury at a court baron is to present the alienation of every burgage tenement, and upon such presentment the steward is to admit the tenant, who then becomes entitled to the franchises of the borough, the jury, at a court baron in 1749, having refused to present several conveyances of burgage tenements, the court

^a 2 T. R. 197.^b 2 T. R. 484.^c 6 East, 431.

granted^d a mandamus to the lord to hold a court, and to the burgesses to attend at such court and to present the conveyances. And though one mandamus will not lie to restore several persons, yet the court held it would lie in this case to the jur^t to do an act to perfect the rights of several. So where, by the custom, the court leet was to present to the steward the person whom the commonalty of the borough had chosen to be mayor, the court granted^e a mandamus to the steward to hold a court leet, and to the in-burgesses to attend at such court, and to present J. D. who had been chosen by the commonalty. And it is the same where no particular person is interested; as where by charter or prescription the corporate body ought to consist of a definite number^f, and they neglect to fill up the vacancies as they happen, the court will grant a mandamus.

III. *Where not.*

It is a general rule, that a mandamus does not lie unless the party making the application has not any other specific legal remedy^g. On this ground the court refused to grant a mandamus to a bishop, to license a curate of a curacy, which had been twice augmented by Queen Anne's bounty, where the right of appointing was claimed by two several parties, and there had been cross nominations; because the party had another specific remedy by *quare impedit*^h. So a mandamus does not lie to the governor and company of the Bank of England to transfer stock, because the party has his remedy by *assumpsit*ⁱ.

Although the court will grant a mandamus in order to enforce the making a poor's rate, they will not grant it with a direction, that certain persons shall be inserted in the rate; although an affidavit be made of the sufficiency of such persons, and that the omission had for its object, the preventing their having votes for members of parliament^k. The power of licensing public houses being absolutely in

^d *R. v. Midhurst*, 1 Wils. 283. 1 Bl. R. 60. Bull. N. P. 200. S. C. by the name of *R. v. Ld. Mountague*.

^e *Borough of Christ Church*, 12 G. 2. Bull. N. P. 200. S. C. cited in 1 Bl. R. 62.

^f *Case of the town of Nottingham*, 23 G. 2. Bull. N. P. 201.

^g Per Buller J. in *R. v. Bp. of Chester*, 1 T. R. 404. and *R. v. the Bristol Dock Company*, M. 52 G. 3. S. P. See also Doug. 526.

^h *R. v. Bp. of Chester*, 1 T. R. 396.

ⁱ *R. v. Bank of England*, Doug. 523.

^k *R. v. Woobly*, Str. 1259.

the discretion of the justices of the peace, the court will not award a mandamus for the licensing a public house¹.

A mandamus will not lie to compel admission to the degree of barrister^a (5). Nor for a fellow of a college, when there is a visitor (6). Nor to the judge of the ecclesiastical court to grant a probate of a will, *lite pendente*^a. Nor to the master and wardens of the company of gun-makers to cause them to give a proof-mark to a freeman of their company. Because they are no legal establishment^a. Nor to the mayor and aldermen of London to admit a person to the office of auditor of the chamberlain's and bridg-master's accounts, who had served it three years successively, because contrary to the custom of the city^a. Nor to the college of physicians, commanding them to examine a doctor of physic, who has been licensed in order to his being admitted a fellow of the college^a. Nor to a visitor where he is clearly acting under a visitatorial authority^a. Nor to a steward of a manor court to admit a person who claimed as heir at law to a customary estate within the manor^a. In *R. v. Jotham*^a, the court refused a mandamus to restore a minister of an endowed dissenting meeting-house; because it did not appear, that he had complied with the requisites necessary to give him a *prima facie* title; adding, that a mandamus to admit was granted merely to enable the party to try his right; but the court had always looked much more strictly to the right of the party applying for a mandamus to be restored; for if he has been before regularly admitted, he may try his right by action for money had and received. A mandamus will not lie to the archbishop of Canterbury to issue his fiat to the proper officer for the ad-

¹ Giles's case, Str. 881. per Ryder C.J. ^a *R. v. College of Physicians*, 7 T. R. 282.
^a *R. v. Nottingham*, Say. R. 217.
^a *R. v. Gray's Inn*, Doug. 353. ^r *Adm. K. v. Bp. of Ely*, 2 T. R. 345.
^a 1 Bl. R. 668. ^s *R. v. Rennett*, 2 T. R. 198.
^a Ray. 989. ^t 3 T. R. 575.
^a 1 T. R. 423.

(5) The only mode of relief is by appeal to the twelve judges.

(6) Wherever there appears to be a general visitor, the common law courts will not interpose; yet as this is in the nature of a plea to the jurisdiction, it must appear on the return. The court will not supersede the writ of mandamus on an affidavit of the fact: it must appear by matter of record, which the party may contest. *R. v. Dr. Whaley*, master of Peterhouse Coll. Cambridge, 13 Geo. 2: 34 MS. Serj. Hill, p. 325.

Handwritten notes:
 R. v. Dr. Whaley, 13 Geo. 2: 34 MS. Serj. Hill, p. 325.
 The visitor was not the proper officer for the visitation.
 The visitor was not the proper officer for the visitation.

mission of a doctor of civil law, a graduate of Cambridge, as an advocate of the court of Arches*.

IV. *Form of the Writ.*

HAVING endeavoured in the foregoing sections to explain the nature of a mandamus, and having briefly stated those cases in which this remedy may be adopted, I shall proceed to consider the form of the writ, as to which the following rules may be useful:

1. Care must be taken that the mandamus is properly directed, that is, to the persons who are to obey the writ^a (7). And this duty is cast upon the person who applies for the writ; for the court, when they grant the writ, will not specify the person to whom it is to be directed^b. If the writ be improperly directed, e. g. if the right of election be in the mayor and aldermen, and the mandamus is directed to the mayor, aldermen, and *common council*, the court will grant a supersedeas; *quia improvide emanavit*^c. If a writ be directed to a corporation by a wrong name, they may return to this special matter, and rely upon it; but if they answer the exigency of the writ, they admit themselves to be the corporation to whom the writ is directed; and cannot take advantage of the misnomer.^d

2. The writ must contain convenient certainty, in setting forth the duty to be performed; but it need not particularly set forth by what authority the duty exists.

Therefore where a mandamus to the commissary of the archbishop of York^e, to admit a deputy register, stated *quod minus rite recusavit* to admit, it was holden

^a R. v. Archb. of Canterbury, 8 East, 213. ^y R. v. Wigan, 2 Burr. 792.

^z R. v. Mayor of Norwich, Str. 55.

^x R. v. Mayor of Hereford, Salk. 701. ^a R. v. Bailiffs of Ipswich, Salk. 434, 5

R. v. Mayor of Rippon, Salk. 433. ^b R. v. Ward, Str. 697.

(7) If the writ is directed to the corporation, it has been held good. But if it be directed to those, who by the constitution of the corporation ought to do the act, without doubt it is good also. Per Holt C. J. R. v. Mayor of Abingdon, Ld. Raym. 560.

sufficient, though it was objected it was the constant form to allege, that the party to whom the writ is directed, is the person to whom it appertains to swear and admit; for if the defendant was not the person to whom the executing this writ belonged, he should have returned so, but instead of that the return consisted merely of matter of excuse; besides, it was laid that *minus rite* he refused, which was an averment that in justice he ought to do it.

So a mandamus to the dean of the Arches to grant probate to Lord Londonderry's executors^c, setting out that the dean *juxta juris exigentiam recusavit*, was holden sufficient, though it was objected that it did not shew the dean's title to grant probate; not having set out that there were *bona notabilia*; for the court will not presume an inferior jurisdiction, and it appeared that he had already done some acts of office as the prerogative judge, and he shall not be received now to say it does not appear he has any jurisdiction.

So a mandamus, reciting whereas there is or ought to be one bailiff and twelve capital burgesses^d.

So a mandamus reciting that there ought to be a common council, consisting of the mayor, and twenty-four persons chosen by the mayor and burgesses, without stating whether by charter or prescription^e.

3. If several persons have been removed, there must be a distinct writ for each person; for they cannot join^f; for the interest is several, and the amotion of one is not the amotion of the others.

4. Every circumstance that is requisite to shew that the party is entitled to be admitted must be suggested in the writ^g; therefore where in a mandamus to the ordinary to license a curate, it was stated that he had been *duly nominated and appointed by the inhabitants* of a township to be curate of the church of P., but neither the consent of the rector, or any endowment or custom for the inhabitants to make such nomination and appointment was stated, the court quashed the writ^h. But although it is essential such facts should be alleged as are necessary to shew that the party applying for the writ is entitled to the relief prayed, no precise form is requiredⁱ.

^c R. v. Bettsworth, Str. 857.

^d R. v. the Devises, M. 7 Ann, Bull. N. P. 204.

^e R. v. Mayor and Burgesses of Nottingham, H. 25 G. 2. Bull. N. P. 204. Say. 36. S. C.

^f 5 Mod. 11. R. v. city of Chester, Salk. 433. 436.

^g 6 Mod. 310. per Holt, C. J.

^h R. v. Bp. of Oxford, 7 East, 345.

ⁱ Per Lee C. J. in R. v. M. & B. of Nottingham, Say. R. 37.

5: The writ must be granted to proceed to an election to the office, and not to elect a particular person^k.

Lastly, the writ must be tested; and there must be fourteen days between the teste and return, if it goes above forty miles, otherwise only eight days, and one day is to be taken inclusive, the other exclusive^l. Upon discovering any informality in the writ, the party may apply to amend at any time before the return^m. A motion, however, cannot be made to supersede the writ after the return is outⁿ, neither will the defendant be permitted to avail himself of any objection to the writ after the return^o.

Where there is a corporation by prescription, the constitution of it (as well as the parties' right) must be verified by affidavit^p. Where it is by charter, a copy of it must be produced at the time of making the motion. Where the court grants a rule to shew cause, though upon shewing cause it appear doubtful, whether the party have a right or not, yet the court will issue a mandamus, in order that the right may be tried upon the return^q. But the court will not grant a mandamus to a person to exercise a jurisdiction, when it is doubtful whether he has the power to exercise it or not^r.

Upon a motion for a mandamus^s to the warden of the vintners' company to swear J. S. one of the court of assistants, the affidavit being only that he was informed by some of the court of assistants that he was elected, and no positive affidavit of an election, the court would only grant a rule to shew cause, but said if there had been a positive affidavit of his election, they would have granted the writ in the first instance.

V. Of the Return.

The next object of consideration is the return.

1. The return must be made by the person to whom the writ is directed.

^k 2 Bulst. 192. 2 Rel. 456. l. 25.

^l R. v. Mayor of Dover, Str. 407.

^m 6 Mod. 133. per Holt, C.J.

ⁿ Said per Lee J. in Whitwood q. t. v.

Jocam, B. R. M. 7 G. 2. MS. to

have been so determined in Ld.

Raymond's time.

^o Per Kenyon C.J. and Buller J. in

R. v. Mayor of York, 5 T. R. 74, 5.

^p Bull. N. P. 200.

^q R. v. Dr. Bland, ib.

^r R. v. Bp. of Ely, 1 Wils. 266.

^s Bull. N. P. 200.

2. It must be positive and certain^t. The same certainty is required in a return to a mandamus as in indictments or returns to writs of habeas corpus^u. But if the return be certain on the face of it, that is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad^x. If the supposal of the writ be false in not truly stating the constitution of the corporation, the return ought to deny the constitution to be as is mentioned in the writ; for if it merely states, that the defendants have acted according to a constitution different from that mentioned in the writ, without denying the supposal of the writ, it will be insufficient^y. The return must not be argumentative^z. In stating a disfranchisement for not attending at an election, it must shew that the person disfranchised was an elector; for where the return stated that the election of a capital burgess was in "*the rest of the capital burgesses being the common council*," that the person disfranchised being a capital burgess did not attend at a meeting for an election whereby no election could be had; but it did not state that *all* the capital burgesses were of the common council, so that it did not appear that the person in question was of the common council and entitled to elect; the court quashed the return^a. But to a mandamus to elect, it is a good return, that a person has been duly elected, and sworn into the office^b.

3. Where the mandamus is to *restore* a person who has been removed from an office, the return must be very accurate in stating, first, the power of the corporation to remove^c.

It was observed by Ld. Mansfield C. J. in *R. v. Richardson*^d, that the power of removal was incidental to the constitution of a corporation; and that it was necessary to the good order and government of corporate bodies that there should be such a power, as much as a power to make by-laws.

The power to remove is *prima facie* in the corporation at large; hence, where in a return to a mandamus to restore, the charter of incorporation was set forth, it was stated that the party was removed *by the corporate body at large*; it was holden^e unnecessary to aver that the body at large

t 11 Rep. 99 b. See also *R. v. M. of Abingdon*, Salk. 432.
u Per Buller J. Doug. 158.
x Doug. 159.
y *R. v. Malden*, Salk. 431.
z *R. v. Lyme Regis*, Doug. 153.
a *R. v. Lyme Regis*, 19 G. 3.
b *R. v. Williams*, Say. R. 140.
c *R. v. Mayor, &c. of Doncaster*, Trin. 25 & 26 G. 2. 34 M&S. Serjt. Hill, p. 210.
d *R. v. Richardson*, 1 Burr. 537. per Ld. Mansfield C. J. See also *R. v. Ponsonby*, 1 Ves. jun. 7.
e *R. v. Lyme Regis*, Doug. 142.

had the power of removal; because the charter making them a corporation, the law implies the right to remove to be in the whole body; and if there were another charter or by-law restraining the power and that were not set out, an action would lie on the return, inasmuch as there would be a *suppressio veri*, for which an action may be maintained as well as for an *allegatio falsi*.

The power of removal cannot be exercised by a select part of the corporate body, unless it be specially given to that part by charter or prescription. Hence, if a return should set forth a removal by the common council, without shewing how they were authorized, it would be bad^f.

Secondly, the return must set forth a sufficient and reasonable cause of removal. There are three kinds of offences^g for which a corporator may be removed:

First,—For any offence committed against his oath of office and duty as a corporator (9).

Secondly,—For any offence which is in itself of so infamous a nature as to render the offender unfit to execute any public franchise, e. g. forgery, perjury, &c. although such offence has not any immediate relation to his office (10).

Thirdly,—For any offence of a mixed nature, as being an offence not only against the duty of his office, but also a matter indictable at common law (11).

^f *R. v. Doncaster*, T. 25 & 26 G. 2. 34 MS. Serjt. Hill, p. 210. Bull. N. P. 305. Say. R. 37. S. C. ^g *R. v. Mayor of Derby*, 9 G. 2. Bull. N. P. 206. *R. v. Richardson*, 1 Burr. 538. *R. v. Liverpool*, 2 Burr. 732.

(9) In this case the corporator is removable without any previous conviction by a jury. Bull. N. P. 206. cites *R. v. Derby*, 9 G. 2. The power of trial as well as motion, for an offence of this kind, is incident to every corporation. See Lord Mansfield's opinion, 1 Burr. 538.

(10) An offence of this kind ought to be established by a previous conviction by a jury, according to the law of the land. Per Lord Mansfield, C. J. *R. v. Richardson*, 1 Burr. 539. It is the infamy which renders the corporator an improper person to be continued in an office of trust; therefore if the crime for which he is convicted be such as does not carry such infamy with it, it will be no cause of disfranchisement; as if he were convicted of a single assault. Bull. N. P. 206, cites *R. v. Derby*, 9 G. 2.

(11) Where the offence is criminal in both respects, the difference seems to be that if it consist of one single fact, as burning the

As to the first ground of removal, viz. what shall be said to be such a breach of duty as will be a good cause of disfranchisement? It is certain that a total desertion of the duty of the office is a good cause of amoval^h; but it may be difficult to determine in what particular offices a bare non-residence will amount to such a desertion.

Where offices are in perpetual executionⁱ, and may not be executed by deputy, there must be a perpetual residence, such as that of sheriff, mayor, coroner^k, &c. But in other cases a local residence is not necessary; as in the case of a recorder, freeman, &c. there non-residence, without neglect of duty, is not a sufficient cause of amoval^l. Indeed it would be absurd to say that mere non-residence should be a cause of amoval, when notwithstanding such non-residence, the officer may do all which his duty requires; but if such persons totally desert their office, it will be a good cause of amoval. As where a recorder upon notice given to him, voluntarily and wilfully absented himself twice from the sessions of the peace^m, although he had appointed the session himself and was in the town; for the recorder is bound to attend and assist at the sessions to direct the corporation in the proceedings of justice; and his office being a public office relating to justice, non-attendance is a good cause of forfeiture. But a mere being absent onceⁿ from attending a session, without any aggravating circumstance, is no cause of forfeiture. In the case of the City of Exeter v. Glide^o, the return was, that the defendant (an alderman, and as such a J.P.) "recessit et habitationem suam reliquit et amovebat seipsum et familiam suam ad Topsam extra civitatem et officium suum reliquit;" it was agreed, that there could not be more apt and express words of the defendant's absence, than the words in this return. So, where a capital burgess left the borough, and lived out of it *for several years*, and neglected attendance at the public assemblies, &c. it was holden to be a sufficient ground for removing him^p. But

^h 4 Mod. 36.

ⁱ Bull. N. P. 206.

^k 3 Atk. 184.

^l Per Lee C. J. in *R. v. M. of Doncaster*, Say. 39, and per Foster J. S. C. 34 MS. Serjt. Hill, p. 217.

^m Serjt. Whitaker's case, Salk. 434. *Ld. Raym.* 1232. S. C.

ⁿ *R. v. Corporation of Wells*, 4 Burr. 1999. Serjt. Burland's case.

^o 4 Mod. 33.

^p *R. v. Truebody*, *Ld. Raym.* 1275. Borough of Lostwithiel.

charters of the corporation, bribery, &c. there must be a conviction; but not where it may be considered as abstracted, the one from the other, as riot and assault upon any other member, so as to obstruct the business of the corporation. *ib.*

where it was returned to a mandamus to restore an alderman, that the alderman on the 1st of May, 1766, departed with his family from the borough, and the liberties thereof, and entirely left the same, with an intent to reside with his family for the future elsewhere; and thence, and until and at the time of the amotion of him, did continually reside with his family out of the said borough, and the liberties thereof, contrary to the duty of his office; and then the return stated a removal on the 10th of September, 1766; the return was quashed, and a peremptory mandamus was awarded^a; Lord Mansfield C. J. observing, that the party had not totally left the borough, that he was absent about four months only, and that he had not received any notice of the charge.

The non-residence of a corporator is not *ipso facto* a forfeiture of the office, but the cause of amoval only; and consequently until amotion, there cannot be any usurpation upon which a quo warranto can be founded^r.

Misemploying the corporation money is not a sufficient cause of disfranchisement, because the corporation may have their action for it^s (12).

A member of a corporation cannot be disfranchised, unless it be for an act which works to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof; and not for any personal offence of one member thereof.

It is competent to a corporation to accept the resignation of a member, and to choose another person in his room; but until such election, the party has power to waive his resignation^t.

A return that the party obstinately and voluntarily refused to obey orders and laws, &c. contrary to the duty of

q R. v. Mayor, &c. of Leicester, 4 Burr. 2087. ven, alderman of Bedford, 2 T. R. 772.
 r R. v. Pousonby, free burgess of the borough of Newtown, Ireland. On writ of error, B. R. Michs. 1755. s R. v. Chalke, Ld. Raym. 296.
 Ryder C. J. 1 Ves. jun. 1. affirmed on error in D. P. Feb 24th, 1758. 2 Bro. t Per Curiam, Sir Thomas Earle's case, Carth. 176.
 P. C. 311. Tomlin's Ed. R. v. Hea- u R. v. M. of Rippon, Salk. 433. See also R. v. Tidderly, 1 Sidf. 14.

(12) In this case another ground of removal was stated, viz. that the defendant had rased one of the books of the corporation; as to which the court observed, that it might be, that the entry was wrong, and he only made it as it ought to be; and farther, the rasure was not averred to be to the detriment of the corporation.

his office and oath is too general; the particular laws ought to be specified^x.

A return of a misbehaviour in one office (e. g. chamberlain) will not afford a reason for his being amoved out of another, viz. that of a capital burgess^y.

Where it appeared by the return that the party had been chosen town-clerk, to hold at the will of the mayor and aldermen, yet as the defendants had not stated any determination of the will, but merely such reasons for his removal as were deemed insufficient, the court granted a peremptory mandamus^z. Although the return be insufficient, yet if it appears to the court, that the party has no ground for being restored, the court will not restore him^a.

Thirdly, the due execution of the power of amoval must be set forth in the return.

If the person be within summons, i. e. if he be resident, he must be summoned to attend and shew cause against his disfranchisement^b; and that he was so summoned, must appear upon the return, unless it appear he was heard; for as the end of summons is, that he may be heard for himself, if he have been heard, want of summons is no objection^c. But if it appear upon the return, that he lived out of the limits of the corporation for several years, it is not necessary to return that he was summoned^d.

In a return to a mandamus to a corporation to restore a member who has been removed, it should appear that the body removing, had proved the charge for which the member was removed. It is not sufficient to state, merely that he was present when the charge was made and did not deny it^e.

Where a burgess is constituted by patent under the common seal, he ought to be discharged in like manner. But if by election, there it is only entered in the book, and an order is sufficient to discharge him^f.

If the members of a corporation are summoned to appear for one particular purpose, they cannot proceed to any other matter without the unanimous consent of the whole body^g.

x R. v. M. of Doncaster, *Ld. Raym.* 1566.

y S. C.

z R. v. Mayor, &c. of Oxford, *Salk.* 429.

a Per Cur. in R. v. Tidderley, 1 *Sidf.* 14.

b Bagg's case, 11 *Rep.* 99. a. R. v. Gas-kin, 8 T. R. 209. S. P.

c Per Curiam, R. v. Wilton, *Salk.* 428.

d R. v. Traebody, *Ld. Raym.* 1275.

e R. v. Faversham, 8 T. R. 352.

f Per Holt C. J. R. v. Chalke, *Ld. Raym.* 226.

g Per Raymond J. Machell v. Nevim-son, E. 10 Geo. 1. 11 East, 87. n.

Upon a return to a mandamus to restore a capital burgess, it appeared, that the power of removing a member was in the mayor and aldermen; that the whole corporation having been summoned to elect a recorder, after that election was over, the mayor and aldermen separated from the rest and removed the plaintiff; and the removal was holden void^h, because there was no summons to meet as mayor and aldermen, but only as part of the whole body.

Upon the issue of *non fuit electus major*, the constitution was admitted to be, that the mayor was chosen out of the aldermenⁱ, therefore the defendant insisted that the plaintiff should prove his being an alderman. The fact of his being chosen an alderman was this; all the common council (who were the electors) except one, met at a public house to drink, where they were acquainted that W. had resigned, whereupon it was proposed to choose the plaintiff, which was objected to by two or three; however, he was sworn in, and this was holden not to be a good election, because they were not corporately assembled for want of a previous summons; and therefore it was absolutely necessary that every one of the common council should be present and consent. So, where upon evidence it appeared that the corporation met upon a particular day (pursuant to a by-law) for the election of a mayor, it was holden^k they could not proceed to the election of an alderman for want of summons, there being no custom to warrant it.

It is not a good return to state, that the party was incapable of being elected, for the proper way of trying whether he was capable of being elected, is by an information in nature of quo warranto^l. So, where all the proceedings of the election were set forth in the writ, concluding "by reason whereof A. was elected," a return, stating that A. was elected, was holden to be bad^m.

4. The same certainty is required in the return, as before the stat. of Queen Anneⁿ.

5. The rule is, not to presume every thing against the return, but not to presume any thing either one way or the other^o.

6. The return must not contain two inconsistent causes^p,

^h R. v. Corp. of Carlisle, T. 6 Geo. 4, cited per Cur. in *Machell v. Nevins*, *Ld. Raym.* 1357, and 11 East, 84. n. where S. P. was decided.

ⁱ *Musgrave v. Nevins*, *Ld. Raym.* 1358.

^k Bull. N. P. 209. cites 2 *Raym.* 1355.

^l R. v. Doncaster, Say. R. 40,

^m R. v. M. of York, 5 T. R. 66.

ⁿ Per *Ld. Mansfield C.J.* in *R. v. Lyme Regis*, Doug. 157.

^o R. v. Lyme Regis, E. 19 G. 3.

^p See 2 T. R. 456.

otherwise the court will quash the whole return^q. But several consistent causes may be returned^r; and where the causes are not inconsistent, although some are bad, yet the court may admit the good and reject the bad.

To a mandamus to restore J. S. to the office of sexton, the defendant returned, that J. S. was not duly elected according to the ancient custom of the parish, and, further, there was a custom for the inhabitants in vestry, to remove the sexton from his office, and that J. S. was removed pursuant to such custom: it was holden^s, that there was not any repugnancy in saying, that J. S. was not *duly* elected; but that being in *fact* elected, they had, according to an ancient custom, removed him. In either case, they were equally entitled to exercise that right. The return, therefore, was allowed.

The return need not be under the seal of the corporation, nor need it be signed by the mayor, for the return of a mandamus is matter of record, and acts done by a corporation upon record, are not required to be under hand or seal, for in such case an action lies against a body politic, or the persons who procure the false return^t.

It remains only to observe, that clerical mistakes in the return may be amended, even after it is filed^u.

VI. Of the Remedy, where the Party, to whom the Writ of Mandamus is directed, does not make any Return, or where he makes an insufficient or false Return.

THE first writ of mandamus always concludes with commanding obedience, or cause to be shewn to the contrary^v; but if a return be made to it, which upon the face of it is insufficient, the court will grant a peremptory mandamus, and if that be not obeyed, an attachment will issue against the persons disobeying it.

q Adm. R. v. M. of Cambridge, 3 T.R. 456. See also R. v. M. of York, 5 T.R. 66.

r Wright v. Fawcett, 4 Burr. 2041.

s R. v. Taunton St. James, Cowp. 413.

t R. v. Mayor of Exeter, Ld. Raym.

223. See also R. v. Chalice, Ld. Raym. 948. S.P.

u R. v. Lyme Regis, E. 19 G. 3. Doug. 157.

x Bull. N.P. 201.

If no return be made, the court will grant an attachment against the persons to whom the mandamus was directed; with this difference, however, that where a mandamus is directed to a corporation to do a corporate act, and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the mandamus: but where it is directed to several persons in their natural capacity, the attachment for disobedience must issue against all^y, though when they are before the court the punishment will be proportioned to their offence.

If the return upon the face of it be good, but the matter of it false, an action upon the case lies for the party injured, against the persons making such false return. And where the return is made by several, the action may be either joint or several, it being founded upon a tort; but if it appear upon evidence that the defendant voted against the return, but was over-ruled by a majority, the plaintiff will be nonsuited^z; and though the return be made in the name of the corporation, yet an action will lie against the particular persons who caused the return to be made^a, or if the matter concern the public government, and no particular person be so interested as to maintain an action, the court will grant an information against the persons making the return^b. The return must be filed and allowed before the information can be moved for.

A mandamus was directed to the mayor, bailiff, and burgesses of A. The mayor made a return^c; a motion was made to stay the filing of it, upon a suggestion, that the return was made against the votes of the majority, who would have obeyed the writ. But the court resolved, that they could not refuse the mayor's return, because he was the principal officer to whom the writ was directed, and actually delivered; and, as he had returned and brought in the writ, it was not fit that the court should examine upon affidavits, whether the majority consented. But if the mayor had made any return, contrary to the votes of the majority, it was at his peril, and the way to punish him was by information.

Note. Where several join in an application for a mandamus, they may all join in the action for a false return^d.

^y *R. v. Overseers of St. Chad's, Salop*,
H. 8 Geo. 2. MS. Bull. N. P. 201.
S. C.

^z Carth. 172.

^a *Per Holt, C. J. Ld. Raym.* 564.

^b *Surgeons' Comp. Salk.* 374. *R. v.*

Mayor of Nottingham, H. 25 G. 2.
Bull. N. P. 203. S. P.

^c *R. v. Mayor of Abingdon, Salk.* 431.
Carth. 499. S. C.

^d *Green v. Pope, Ld. Raym.* 125.

And if in such action or information the return be falsified, the court will grant a peremptory mandamus; however, it cannot be moved for until four days after the return of the postea, because the defendants have that time to move in arrest of judgment^e.

In an action for a false return^f the plaintiff set out, that he was chosen upon the first of October, according to the custom. Upon evidence it appeared, that the custom was to choose on the 29th of September, and that the plaintiff was then chosen; and this was holden sufficient to support the declaration, for the day in the declaration is but form.

If the mayor of a corporation procure a false return to be made, it will be sufficient evidence against him, that the mandamus was delivered to him, and that the mandamus has such a return made; and that will be presumptive against him, that he made that return, unless he shews the contrary. For the mayor or any other member of the corporation, or other, who shall procure a false return to be made, are liable in their private capacity^g.

In an action brought in C. B. for a false return the plaintiff obtained judgment, the court of B. R. refused to grant a peremptory mandamus; Holt C. J. observing, that every mandamus recites the fact *prout patet nobis per recordum*, and that they could not take notice of the records of the Common Pleas^h (13).

Before the stat. 9 Ann. c. 20. except in extraordinary casesⁱ, an attachment did not issue for want of a return, until after the return of an *alias et pluries* writ of mandamus and disobedience of a peremptory rule to return^k. But by that statute, reciting that persons who had a right to the office of mayors, or other offices within cities, towns corporate, boroughs, and places, or to be burgesses or freemen

^e Per Holt, C. J. *Buckly v. Palmer*, Salk. 430, 1.

^f *Vaughan v. Lewis*, Carth. 928.

^g Per Cur. R. v. Chalice, Ld. Raym. 948.

^h Anon. Salk. 428. probably the S. C.

as is reported by the name of *Green v. Pope*, 1 Ld. Raym. 128. where S. P. is said to have been ruled.

ⁱ See Skinn. 669.

^k Bull. N. P. 203.

(13) Yet where in an action for a false return, judgment was given for the defendant, and upon a writ of error judgment was reversed in the Exchequer Chamber, the Court of K. B. granted a peremptory mandamus before judgment entered, saying, it was a mandatory writ, and not a judicial writ founded upon the record. Bull. N. P. 202.

thereof, had either been illegally turned out, or had been refused to be admitted thereto, and had no other remedy to procure themselves to be admitted or restored, than by writs of mandamus, the proceedings on which were very dilatory and expensive, it was enacted,

1. That a return should be made to the first writ of mandamus¹.

2. That the persons prosecuting such writ might plead to², or traverse all or any the material facts contained in the return, to which the persons making such return should reply, take issue, or demur; and such further proceedings should be had therein, as might have been had if the persons suing such writ had brought their action on the case for a false return, and in case a verdict should be found, or judgment given for them upon a demurrer, or by *nihil dicit*, or for want of a replication or other pleading, they should recover damages and costs, and a peremptory writ of mandamus should be granted without delay for them for whom judgment shall be given, as might have been if such return had been adjudged insufficient; and in case judgment shall be given for the persons making such return, they shall recover costs.

3. The stat. for the amendment of the law (4 Ann. c. 16.) and all the statutes of jeofail shall be extended to writs of mandamus, and the proceedings thereupon³.

The power of traversing the return, which is given by the second section of the preceding statute, is given in the room of an action for a false return; and as in such action it cannot be said that the damages are collateral, so neither can it be said that they are collateral in a proceeding under the statute, for they are consequent or dependent upon the issue, and the jury are to inquire of the damages as parcel of the charge; and, consequently, if in a proceeding under the statute, the jury omit to find damages and costs for the plaintiff, whether the verdict be general or special, this defect cannot be supplied by a writ of inquiry⁴: but in such case the party may bring an action for a false return, for the act does not take away the party's right to bring such action, but only provides that in case damages are recovered by virtue of that act, against the persons making the return, they shall not be liable to be sued in any other action for making such return⁵.

¹ S. 1.

² S. 2.

³ S. 7.

⁴ *Kynaston v. Mayor of Shrewsbury*,
T. 9 & 10 G. 2. MS. and Str. 1052.
S. C.

⁵ Bull. N. P. 203. See Str. 1053.

Since the preceding statute, a mandamus in cases to which the statute applies, is in the nature of an action, pleadings therein being admitted, and it seems that in such cases a writ of error lies upon the judgment^q; but upon the award of a peremptory mandamus, in a case to which the stat. of Ann. does not apply, a writ of error will not lie^r.

It appears from the wording of the statute, that there are many cases to which it does not extend; therefore in all those cases the proceedings must be according to the course of the common law^s.

q 1 P. Wms. 351. Str. 1059.

r Dean of Dublin v. the King, in ex-

ror.—D. P. 21st April, 1724. 1 Bro.

P. C. 73. Tomlin's Ed.

s Bull. N. P. 204.

CHAP. XXIX.

MASTER AND SERVANT.

- I. *Of Actions by Servants against their Masters for the Recovery of their Wages; and herein of Seamen's Wages, and the several Statutes relating thereto, viz. St. 2 G. 2. c. 36.—31 G. 3. c. 39.—37 G. 3. c. 73.—8 G. 1. c. 24.*
 - II. *Of the Liability of the Master in respect of a Contract made by the Servant.*
 - III. *Of the Liability of the Master in respect of a tortious Act done by the Servant.*
 - IV. *Of Actions brought by Masters for enticing away Apprentices and Servants, and for Injuries done to their Servants; and herein of the Action for Seduction—Witness—Damages.*
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- I. *Of Actions by Servants against their Masters, for the Recovery of their Wages; and herein of Seamen's Wages, and the several Statutes relating thereto, viz. St. 2 G. 2. c. 36.—31 G. 3. c. 39.—37 G. 3. c. 73.—8 G. 1. c. 24.*

IF a person retains a servant under an agreement to pay him so much by the day, month, or year, in consideration of the service to be performed, the servant, having fulfilled his part of the contract, may maintain an action against the master, or, in case of his death, against his personal repre-

sentative, for a breach of the contract on the part of the master.

The form of action will depend upon the nature of the contract; if the contract be by deed, an action of debt or covenant must be brought (1); if by parol, (*i. e.* in writing, but not a specialty or verbal,) an action of debt or assumpsit.

If a servant be hired in a general way^a, he is considered to be hired with reference to the general understanding upon the subject, viz. that he shall be entitled to his wages for the time he shall serve, though he do not continue in the service during the whole year (2); and if he die before the end of the year, his personal representatives will be entitled to a proportionable part of the wages due to him at the time of his death.

A master may discharge his servant at a moment's warning for misconduct^b, *e. g.* for being absent when wanted, sleeping from home at night without his master's leave, &c. and in such case the servant will only be entitled to such wages as are due at the time of his discharge (3).

A servant who comes over from the West Indies^c, where he has been a slave, and who continues in the service of his master, in England, without any agreement for wages, is not entitled to any wages, unless there has been an express promise on the part of the master.

^a Admitted in *Cutterm. v. Powell*, 6 T. R. 320.

^b *Robinson v. Hindman*, B. R. Lon-

don Sittings after M. T. 41 G. 3. Kenyon C. J. 3 Esp. N. P. C. 235.

^c *Alfred v. M. of Fitzjames*, 3 Esp. N. P. C. 3.

(1) If a feme covert, without any authority from her husband, contract with a servant by deed, the servant having performed the service stipulated, may maintain an action of assumpsit. *White v. Cuyler*, 6 T. R. 176.

(2) See the case of *Worth v. Viner*, in *Vin. Abr.* vol. 3. p. 8. tit. Apportionment.

(3) But if the servant has not been guilty of misconduct, and the master discharges him without warning, the servant in that case will be entitled to a month's wages beyond the wages due for the period of actual service. Admitted per Kenyon C. J., S. C.

Of Seamen's Wages, and the several Statutes relating thereto, viz. Stat. 2 G. 2. c. 36.—31 G. 3. c. 39.—37 G. 3. c. 73.—8 G. 1. c. 24.

It may not be improper in this place to introduce some remarks relating to seamen employed in merchant ships, who stand in the relation of servants to the master or ship-owner, more especially as this relation has been modified and altered by several statutes.

Seamen employed in merchant ships are usually hired at a certain sum, either by the month or for the voyage^d.

By stat. 2 G. 2. c. 36. (entitled an act for the better regulation of seamen in the merchant service, and made perpetual, and extended to all his Majesty's colonies in America, by stat. 2 G. 3. c. 31.) masters of ships, bound to parts beyond the seas, are prohibited from carrying any seamen or mariners (except their apprentices) to sea, upon any voyage to parts beyond the seas, without first agreeing with them for their wages; and this agreement must, 1st, be in writing (4); 2dly, it must declare the wages (5) which each mariner is to have during the whole voyage, or for so long time as he ships himself for; 3dly, it must express the voyage for which the mariner is shipped; 4thly, it must be signed^e by the mariner within three days after he has entered himself on board the ship. This agreement is, after signing, conclusive to all parties during the time agreed for^f.

d Abbott, 382. ed. 2d.

e S. 2.

f S. 2.

(4) The statutes relating to seamen's wages do not declare that a verbal agreement shall be void, but impose a penalty on the master, if there be not a written agreement. Abbott, 391.

(5) A sailor brought an action against a master of a ship, and declared on an agreement, whereby it was stipulated, that the sailor should have a certain sum per month during a voyage from London to Africa, and thence to the West Indies, *and also so much money as should be the average price of a negro slave in the West Indies.* In the ship's articles no mention was made of the money to be paid to the plaintiff as the average price of the negro slave. It was holden, that the additional perquisite of the average price of a negro slave could only be considered as wages, and therefore ought to have been inserted in the written agreement. *White v. Wilson*, 2 Bos. & Pul. 116. In like manner it has been holden, that the seamen cannot claim any money as *gratuity money* due by usage. *Elsworth v. Woolmore*, 5 Esp. N. P. C. 84.

Masters or commanders offending against these provisions, are made liable to a penalty of 5*l.* for every mariner carried to sea, without having entered into the requisite agreement, the penalty to be paid to the use of Greenwich Hospital, and recoverable by information before J. P.^t.

Masters are also required, under a penalty of twenty shillings, to pay their seamen, upon their arrival in Great Britain, their wages, *if demanded*, within thirty days after entry of the ship at the Custom House, (except where a covenant has been entered into to the contrary,) or at the time of their discharge, which shall first happen, deducting the penalties and forfeitures which may have been incurred; and such payment shall be valid, notwithstanding any action, bill of sale, attachment, or incumbrance. The penalty imposed on masters for disobedience to this regulation, is recoverable by the same method as the wages^b.

Mariners, by entering into or signing the agreement, are not to be deprived of using any lawful means for the recovery of wages against the ship, master, or owners^c.

In all cases where it may be necessary to produce the written agreement in court, no obligation shall lie on the mariner to produce the same, but on the master or owner; and no mariner shall fail in any action, &c. for the recovery of wages, for want of such agreement being produced^d. It is not necessary for the seaman to give the captain notice to produce this agreement^e.

The penalties imposed on seamen for desertion and absenting themselves without leave, are as follows:

1. Any mariner deserting or refusing to proceed on the voyage, or deserting from the ship in parts beyond the seas, after having signed the agreement, forfeits *to the owners* the wages due at the time of his deserting or obstinately refusing to proceed on the voyage^f (6).

g S. 1.
h S. 7.
i S. 8.
k S. 8.

l *Bowman v. Manzelman*, 2 Camp. N.
P. C. 315.
m S. 3.

(6) "Entering or being entered into the service of his Majesty, on board any of his Majesty's ships, will not occasion a forfeiture of wages, nor is it to be deemed a desertion." S. 13. Being compelled to quit the ship through inhuman treatment of the master^g, or being dismissed without lawful cause, will not be deemed desertion[†]. So where the seaman is impressed into the royal service, he

* *Limland v. Stephens*, 3 Esp. N. P. C. 269. *Kenyon C. J.*

† *Sigard v. Roberts*, 3 Esp. N. P. C. 72. *Eldon C. J.*

2. Any mariner absenting himself from his ship, without leave from the master, &c. shall, for every such day's absence, forfeit two days' pay to the use of Greenwich Hospital^a.

3. Any mariner, not entering into his Majesty's service, who leaves the ship without a discharge in writing, from the master, commander, or other person, having charge of the vessel, forfeits one *month's pay* (7), to be recovered and applied according to the directions of the statute^a (8).

The foregoing provisions having been found, by experience, to be highly beneficial to the trade and navigation of

n S. 5.

p S. 6.

will be entitled to receive a proportion of his wages up to the time of impressing. *Wiggins v. Ingleton*, 2 Ld. Raym. 1211. per Holt C. J. but nothing further. *Clements v. Mayborn*, B. R. T. 24 G. 3. Abbott, 395. and the voyage must be completed. 2 Camp. N. P. C. 320. n.

(7) The meaning of the first and second of these provisions is, that if the mariner run away before the voyage is commenced, or in parts beyond the seas, he shall forfeit his whole wages; if he absent himself during the voyage and return, he shall forfeit two days' pay. The third provision was intended to prevent seamen from quitting the ship after her arrival at the port of delivery, and before she is unladen, at which time the voyage must be considered as at an end for the purposes of a general forfeiture. See the preamble to the 6th section, and *Frontine v. Frost*, 3 Bos. & Pul. 302. In order to avail himself of a forfeiture under this provision, it is incumbent on the master, who claims the forfeiture, to give some evidence to prove that the seaman quitted the ship without leave in writing. It is not necessary for the seaman to prove that he had such leave. 3 Bos. and Pul. 302.

(8) The 9th section authorizes the master, commander, or owners, to deduct out of any seaman's wages all the penalties and forfeitures incurred by the act, and to enter them in a book to be signed by the master or commander, and two principal officers of the ship, setting forth that the penalties and forfeitures contained in such book are the whole penalties and forfeitures stopped during the voyage, which penalties and forfeitures (except the forfeiture for desertion) shall go to Greenwich Hospital, and be paid and accounted for, by the master or commander, to the officer who collects the sixpence per month.—N. In an action by the seaman against the master for wages, the master will not be allowed to set off the before-mentioned deductions, unless he has previously debited himself to Greenwich Hospital for the amount in a book kept according to the directions of the statute. 3 Bos. & Pul. 302.

this kingdom, similar regulations were established by stat. 31 G. 3. c. 39. for the government of seamen employed in the coasting trade of Great Britain, in vessels of the burthen of 100 tons or upwards, which shall go to open sea. N. No agreement made by virtue of this act shall be charged with a stamp duty.

The most material points of difference between this statute and the former, are, 1. that masters are required, under this act, to pay the seamen within *five* days, instead of thirty days, after entry of the ship at the Custom-House, or cargo delivered. 2. If a seaman, having signed the requisite agreement, *neglects or refuses* to proceed on the intended voyage, he forfeits to the owners all the wages due to him at the time; but the forfeiture for *desertion afterwards*, and before the voyage agreed upon, or upon which the ship has proceeded, is completed, and the cargo delivered, or before the seaman has a discharge in writing from the master, &c. is only of *one month's* wages to the use of Greenwich Hospital. 3. By the 9th section, the following method of ascertaining the penalties incurred is prescribed in cases where the contract for wages is by the voyage, and not by the month, or other stated period of time, viz. 1. "If the whole time spent in the voyage agreed or proceeded upon *exceeds* one lunar month, the forfeiture of one month's pay shall be deemed a forfeiture of a sum of money, bearing the same proportion to the whole wages as a lunar month bears to the whole time spent in the voyage. The same rule is to be adopted in ascertaining the amount of the forfeiture of two days' pay. 2. If the whole time spent in the voyage does *not* exceed one lunar month, the forfeiture of one month's pay shall be deemed a forfeiture of the whole wages; and, 3. If such time does not exceed two days, the forfeiture of two days' pay shall be deemed a forfeiture of the whole wages."

Further regulations have been established by the legislature, to prevent the desertion of seamen from British merchant ships trading to his Majesty's colonies in the West Indies.

By stat. 37 G. 3. c. 73. s. 1. it is enacted, "that every seaman, mariner, and other person, who deserts at any time during the voyage out or home, from any British merchant ship trading to or from the said colonies, shall, in addition to former penalties, forfeit all the wages he may be entitled to during the voyage, from the master or owner of the ship *on board of which he shall enter*, immediately after such desertion."

By the 2d section, a penalty of 100*l.* is imposed on masters or commanders who hire seamen, &c. who, to their knowledge, have deserted from other ships.

By the 3d section, no master sailing from any place in Great Britain, shall hire any seaman, &c. at any place within his Majesty's colonies, &c. in the West Indies, at more wages than, according to the rate of double monthly wages contracted for with the seamen, &c. (in the same degree and station) hired at the last departure of the vessel from Great Britain, unless the governor, &c. of such place in the West Indies shall think that greater wages ought to be given, and shall authorize the same to be given by writing under his hand (9), and all contracts, bonds, bills, and other securities, made contrary to the meaning of this act, are declared to be void, and the master entering into them, or hiring seamen, or paying wages, otherwise than as the act directs, is made subject to a penalty of 100*l.* for every offence.

By the 5th section, masters are required, under a penalty of 50*l.* within ten days after their arrival in the West Indies or Great Britain, to deliver in, on oath, a true list and description of the crew on board at the time of clearing out and arrival, and of every seaman, &c. who has deserted or *died during the voyage, and also a true account of the wages due to each seaman, &c. so dying, at the time of his death,* and further^d, the money due for such wages shall be paid by the master within three months after arrival in any port of Great Britain, to the receiver of the sixpenny duty for Greenwich Hospital, to the use of the personal representatives of such seaman, &c.; and in case the master neglects or refuses to pay such wages to the said receiver, within the time limited, he is made liable to a penalty of 50*l.* and also double the amount of the wages (10).

q s. 7.

(9) In this licence from the governor, &c. the rate of the wages allowed by him must be specified, otherwise the licence will be useless. *Rodgers v. Lacy*, 2 Bos. & Pul. 57.

(10) In the construction of these provisions, it has been holden, that if the *whole* wages due to the deceased seaman have been paid to the receiver of Greenwich Hospital, the representatives of such seaman have not any right of action against the master for the wages; but if a *part only* has been paid in, and the remainder has been fraudulently withholden, the representatives of the seaman may maintain an action for such remainder, notwithstanding this statute. *Armstrong v. Smith*, 1 Bos. & Pul. N. R. 299.

The penalties, when recovered, are distributed thus: one third to Greenwich Hospital; one third to the support of the seamen's hospital at the port where the ship arrives, if there be any hospital—if not, to the old and disabled seamen of that port and their families; and the remaining third to the person informing and suing.

By stat. 8 G. 1. c. 24. s. 7. (made perpetual by stat. 2 G. 2. c. 28. s. 7.) masters or owners of any merchant ship or vessel are prohibited from paying or advancing to any seaman or mariner, while he is in parts beyond the seas, any money or effects upon account of wages, exceeding one moiety of the wages due at the time of such payment, until the return of the ship to Great Britain or Ireland, or the plantations, or to some other of his Majesty's dominions whereto they belong, under a penalty of double the money so paid or advanced, recoverable by common informer in the High Court of Admiralty.

Having detailed the most material legislative provisions on this subject, it will be proper to take notice of the rules of law and judicial decisions, as far as they affect the contract under consideration.

The most important rule on this head is, "that freight is the mother of wages;" *i. e.* if the ship has earned its freight, and the seaman has performed his stipulated duty, he becomes entitled to his wages (11).

If the ship be captured^a, or lost in the voyage, the seamen lose their wages.

In an action for seaman's wages^t, it appeared, that the

^r Anon. 2 Shew. 283. Abbott, 398.

^t Appleby v. Dods, 8 East, 300.

^s Abernethy v. Landale, Doug. 539.

Per Buller J. 1 T. R. 79.

(11) If the ship be lost before the first port of delivery, the seamen lose all their wages; but if lost after she has been at the first port of delivery, then they lose only those accrued due from the last port of delivery; but if the seamen run away, although they have been at a port of delivery, yet they lose all their wages. Per Holt C. J. *ex relatione* M^ri Jacob, 1 Ld. Raym. 639.

If a ship be bound for the East Indies, and thence to England, and the ship unlades at a port in the East Indies, and takes freight for England, and in her return she is taken by enemies, the mariners shall have their wages for the voyage to the East Indies, and for half the time that they stayed there to unlade, and no more. Per Holt C. J. London sittings. 1 Ld. Raym. 739. 12 Mod. 409. S. C. See also Appleby v. Dods, 8 East, 300.

seaman had entered into the usual articles, "to serve as a mariner on board a West India ship bound for the ports of Madeira, any of the West India Islands, and Jamaica, and to return to London, and in consideration of the monthly wages therein mentioned, to perform the above-mentioned voyage; but it was expressly stipulated, that he was not to demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the above-mentioned port of discharge. The ship sailed, delivered her cargo at Madeira, and took in wine, part of which she delivered at Dominica, other part at Kingston in Jamaica, there took in government stores, delivered them at Port Antonio, in Jamaica, and the remainder of the wine at Martha Bray, in the same island. She was then freighted with a cargo of sugars for London, for which she sailed, but was lost at sea in the course of her passage home. It was contended on the part of the plaintiff, that the voyage being, by the terms of it, divided into three parts: 1st, to Madeira, next to the West Indies, and lastly home; and freight having been earned in the two first stages of the voyage, the plaintiff was entitled to recover his wages *pro rata*, for so many entire months as had been spent in the voyage. But Lord Ellenborough C. J. being of opinion, that, according to the true construction of the articles, the port of London was to be considered as the port of discharge, and consequently, as the ship had not arrived there, the plaintiff was precluded by the express stipulation from recovering any part of his wages, nonsuited the plaintiff. On motion to set aside the nonsuit, the Court of King's Bench concurred in opinion with the C. J.

There has not been any case wherein it has been decided, that a ship seized by way of retaliation, and afterwards restored, has been considered as captured; or in which the consequences of capture, as dissolving a contract for wages, have been considered as attaching.

Seizure, even hostile seizure^a, is not necessarily capture, though such is its usual and probable result. The ultimate act or adjudication of the state, by which the seizure has been made, assigns its proper and conclusive quality and denomination to its own original proceeding. If it condemn in such case, it is a capture *ab initio*; if it award restitution as an act of justice, it pronounces on its own act, as not being a valid act of capture, but as an act of temporary seizure and detention upon grounds not warranting the condemna-

^a Per Ellenborough C. J. delivering the opinion of the court in *Beale v. Thompson*, 4 East, 261.

tion of the property, or the dealing with it as captured (12). Hence, in the case of the seamen^x who were forcibly taken out of British merchant ships at Petersburg, by order of the Russian government, and marched into the interior of the country, after which hostilities between Great Britain and Russia took place, but on the re-establishment of peace, the ships of both countries were restored, and the seamen were permitted to return with their vessels, which brought home their cargoes and earned their freight; it was holden, that this seizure, however hostile in the manner, so far partook of the nature of an embargo in its result, and not of a capture, that it did not put an end to the contract of the seamen for wages, even during the time of the detention and imprisonment: but, even considering it as a temporary capture, yet, like the case of a capture and recapture, the seamen were still entitled to their wages; their being so entitled depended on the ship earning her freight for the voyage, and the performance of their stipulated duty; and here freight for the voyage was ultimately earned, and the seamen were not guilty of any breach of duty; for the stipulation in the articles (13), not to be on shore under any pretence, without leave, before the voyage was ended, must be understood of a being on shore by the party's own unauthorised act; and even if such imprisonment on shore could be so considered, yet the master having afterwards received them again on board, without objection, amounted to a dispensation of the service in the interval, and entitled them to wages according to the original contract.

If a seaman can prove that he was disabled from performing his duty by an accident^y, e. g. by receiving a blow from a piece of timber accidentally falling on him, he will be entitled to recover his wages for the whole voyage, in like manner as if he had actually served.

A seaman, who is impressed before the ship returns to a

^x *Beale v. Thompson*, in error, 4 East, 546. ^y *Chandler v. Greaves*, 2 H. Bl. 606.
n. But see the remarks of *Grose J.*
6 T. R. 325.

(12) "It seems to be immaterial for this purpose, whether the restitution be awarded by the government of the country, as an act of state, or by any of the ordinary courts of civil judicature to which the administration of justice on these subjects is usually delegated." Per Lord Ellenborough C. J. 4 East, 561.

(13) The seamen had signed the articles in the usual form.

port of delivery, is entitled to his wages *pro tanto*^a, if the ship complete her voyage; but not if she is captured on her return^a.

But in a case where the defendant^b gave a written promise to pay the plaintiff's intestate a gross sum (*thirty guineas*), provided he *proceeded, continued, and did* his duty as second mate in a certain ship, from Jamaica to Liverpool, and the intestate, who had regularly performed his duty, died about a month after the ship had sailed, and before her arrival at Liverpool; and it appeared, that the common rate of wages was 4*l.* per month, when the party was paid in proportion to the time he served, and that the voyage was generally performed in two months; it was holden, that the representative of the intestate was not entitled to recover any wages on the *express* contract, because it was an entire contract and not divisible; nor on an *implied* contract, by reason of the axiom of law, that where the parties have entered into an express contract, no other can be implied.

It only remains to state the remedies which the law has provided for the recovery of seamen's wages.

If the hiring be on the usual terms^c, and made by word or by writing only, without seal, the seamen, or any one or more of them, and every officer, except the master, may sue in the Court of Admiralty, and may, by the process of that court, arrest the ship as a security for their demand (14), or cite the master or owners personally to answer to them.

But if the agreement be by deed, and the terms of such agreement are not the usual terms, then the only remedy is in the common law courts (15).

^a Per Holt C.J. in *Wiggins v. Ingleton*, *c* Abbott, 421, 9. *cites* Winch, 8. 2 *Ld. Raym.* 1211. 2 *Vent.* 181. 8 *Mod.* 379. 2 *Ld. Raym.* 1206. 1 *Str.* 707. *Say.* 136. 1 *Ld. Raym.* 632. *Salk.* 33. 2 *Str.* 858. *N. P. C.* 320. n. 1 *Bernard.* 297. *Str.* 937.
^b *Cutter v. Powell*, 6 *T. R.* 320.

(14) In proceeding against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it, the seaman's claim for his wages is preferred before all other charges; for the labour of the seamen, having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which otherwise they could not have had. Abbott, 430.

(15) In the courts of common law the seamen may sue either the master, as the person immediately contracting with them, and answerable to them or the owners, as the persons virtually contracting with them through the agency of the master, and answerable for the performance of his engagement. Abbott, 431.

But whether the party sue in the Court of Admiralty^d, or bring the action in the courts of common law^e; in both cases the suit or action must be commenced within six years next after the cause thereof has accrued, unless the party suing should have been under any of the disabilities mentioned in the statute of limitations, as infancy, absence beyond the seas, &c.

II. *Of the Liability of Masters in respect of Contracts made by their Servants.*

A CONTRACT made by a servant acting under the express authority of the master is binding on the master.

And the same rule holds, where the servant acts under an implied authority.

The defendant^f, who was a dealer in iron, sent a waterman to the plaintiff for iron on trust, and paid for it afterwards. He sent the same waterman a second time, with ready money, who received the goods, but did not pay for them. Pratt C. J. ruled, that the sending the waterman on trust the first time, and the defendant paying for the goods, was giving the waterman a credit so as to make the defendant liable upon the second contract.

In an action by a publican^h, for beer sold, it appeared that the defendant had dealt with the plaintiff on credit, and paid him several sums for beer; at length the defendant gave notice to plaintiff's servant, who brought the beer, that he would pay for the beer as it came in. The defence to the present action was, that the defendant had paid the servant. Lord Eldon C. J. thought that the defendant was liable; for, as the change in the usual mode of dealing had been suggested by the defendant himself, and as he had personal dealings with the master, in a particular mode, notice to the servant alone of a change in that mode would not be sufficient; the defendant must shew that the master himself had notice of it, or he could have no defence to the action.

In an action on a farrier's billⁱ, it appeared, that the defendant, by an agreement with his groom, allowed him five

^d Stat. 4 Ann. c. 16, 17, 18, 19.

^e 21 Jac. 1. c. 16. s. 3, 7. See ante, p. 124.

^f F. N. B. 120. G.

^g Hazard v. Treadwell, Str. 505.

^h Gratland v. Freeman, 3 Esp. N.P.C. 85.

ⁱ Precious v. Abel, 1 Esp. N. P. C. 350.

guineas a year, for which he was to keep the horses properly shod, and furnish them with proper medicines when necessary. *Ld. Kenyon* said, that it was no defence to the action, unless the plaintiff knew of this agreement, and expressly trusted the groom. That if the servant buys things which come to his master's use, the master should take care to see them paid for; for a tradesman has nothing to do with any private agreement between the master and servant.

But where an express authority is not given by the master, and from the nature of the case an authority cannot be implied, the master is not liable.

Hence, where the chaise of the master had been broken by the negligence of his servant^k, and the servant desired a coachmaker, *who had never been employed by the master*, to repair it, which was accordingly done, and the master refusing to pay the amount of the bill sent in by the coachmaker, he insisted on retaining the chaise as a lien; *Lord Ellenborough C. J.* was of opinion, that the coachmaker was not entitled so to retain it; for whatever claim of that sort he might have, he must derive it from legitimate authority; that unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of the servant to bind him to contracts of which the master had not any knowledge, and to which he had not given any assent. It was the duty of the tradesman, when he was employed, to have inquired of the principal, whether the order was given by his authority; but having neglected to do so, the master was not liable to the demand, and the detainer of the chaise was unlawful.

When the master is in the habit of paying ready money for articles furnished in certain quantities to his family^l, if the tradesman delivers other goods of the same sort to the servant, upon credit, without informing the master of it, and the latter goods do not come to the master's use, the master is not liable.

A master contracted with a tradesman to serve him with articles for ready money^m, and the master gave his servant money to pay for the articles, which was done accordingly; after some time the master turned away this servant, and took another, to whom he gave money as before; the second servant did not pay the tradesman, and afterwards ran away: an action having been brought by the tradesman against the

^k *Hiscox v. Greenwood*, 4 Esp. N.P.C. 174. ^m *Stabbing v. Heintz*, Peake's N.P.C. 47.

^l *Pearce v. Rogers*, 3 Esp. N.P.C. 914.

master, it was holden, that the master was not liable to pay the money again (16).

A journeyman to a baker was holden a good witness to prove the delivery of bread to the defendant^a, without a release, in a case where there was not any evidence of an usage for the journeyman to receive the money for the bread delivered.

A clerk who receives money for his master is a good witness to prove that he has paid it over to his master, *ex necessitate rei*, without a release^b.

III. *Of the Liability of the Master in respect of a tortious Act done by his Servant.*

AN action on the case will lie against a master for an injury done through the negligence or unskilfulness of the servant acting in his master's employ.

As where the servants of a carman ran over a boy in the streets^c, and maimed him by negligence, an action was brought against the master, and the plaintiff recovered.

So where the servant of A.^d, with his cart, ran against the cart of B. which contained a pipe of wine, whereby the wine was spilled; an action was brought against A., the master, and holden to be maintainable.

An action on the case is the proper remedy for an injury of this kind, and not an action of trespass^e.

In these cases, if the declaration state that the defendant (the master) negligently drove his cart^f, &c. it will be supported by evidence that the defendant's *servant* drove the cart.

The servant may be examined by the defendant (the

^a *Adams v. Davis*, 3 Esp. N. P. C. 48. p 1 Ld. Raym. 739. ex rel. M^ri Place.
^b Eldon, C. J. q Id.
^c *Matthews v. Haydon*, 3 Esp. N. P. C. r *Morley v. Gaisford*, 2 H. Bl. 449.
^d 509. s *Brucker v. Froment*, 6 T. R. 659.

(16) It was said by Lord Kenyon in this case, that if the master employs the servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit.

master) as a witness, *having been released by his master*^a, but not otherwise^b; because the verdict in this action may be given in evidence by the master in an action brought by him against the servant, *as to the quantum of damages*.

In like manner, the servant of the plaintiff may be examined by the plaintiff, having first been released by the plaintiff^c.

To an action on the case against several partners^d, for negligence in their servant, whereby the plaintiff's goods were lost, it cannot be pleaded in abatement that there are other partners not named.

Having stated the cases in which the law considers the master as responsible for the injurious act of his servant, it may be proper to observe, that where the servant commits a *wilful* trespass, without the direction or assent of the master, an action of trespass will not lie against the master; in such case the servant only is liable. As, where a servant of the defendant wilfully drove the defendant's chariot against the plaintiff's chaise^e; an action of trespass having been brought against the defendant, it appeared in evidence, that the defendant was neither present at the time when the injury was committed, nor had he in any manner directed or assented to the act of the servant; it was holden, that the action could not be maintained.

So where one of a ship's crew wilfully injured another ship, without any direction from or privity of the master, it was holden, that trespass could not be maintained against the master, although he was on board at the time^f.

If a master command his servant to do an *illegal* act^g, the servant, as well as the master, will be liable to the party injured; for the servant cannot plead the command of the master in bar of a trespass.

An action on the case was brought against a master and his servant^h, for breaking a pair of horses in Lincoln's Inn Fields, where, being unmanageable, they ran against and hurt the plaintiff; it appeared that the master was absent; but it was holden, on motion in arrest of judgment, that

t *Jervis v. Hayes*, 2 Str. 1093. per Lee, C. J.

u *Green v. The New River Com.*, 4 T. R. 589.

x *Miller v. Falconer*, 1 Camp. N. P. C. 951.

y *Mitchell v. Tarbutt and others*, 5 T. R. 649. See 2 Bos. & Pul. N. R. 365.

z *McManus v. Crickett*, 1 East, 106.

a *Bowcher v. Noidstrom*, 1 Taunt. 568.

See *Nicholson v. Mounsey*, *infr.* p. 997.

b *Sands v. Child*, 3 Lev. 352.

c *Michael v. Alestree and another*, 3 Lev. 172. See *ante* p. 400.

the action would lie; for it should be intended that the master sent the servant to train the horses there.

In an action on the case^d against the defendant for causing a quantity of lime to be placed on the high road, by means of which the plaintiff and his wife were overturned and much hurt, and the chaise in which they then were was considerably damaged; it appeared that the defendant having purchased a house by the road side, (but which he had never occupied,) contracted with a surveyor to put it in repair for a stipulated sum; a carpenter having a contract under the surveyor to do the whole business, employed a bricklayer under him, and he again contracted for a quantity of lime with a lime-burner, by whose servant the lime in question was laid in the road. In support of the action, it was contended, that the act, which caused the injury complained of, was an act done for the benefit of the defendant, and in consequence of his having authorized others to work for him; and although the person by whose neglect the accident happened was the immediate servant of another, yet for the benefit of the public he must be considered as the servant of the defendant. If the defendant was not liable, the plaintiff might be obliged to sue all the parties who had subcontracts before he could obtain redress. On the part of the defendant, it was urged, first, that the cause of action did not arise on the defendant's premises, the complaint being, that a quantity of lime, which should have been placed there, was actually laid on the high-road: that being the case, there was no authority to shew that the defendant was liable, merely because the act from which the injury arose was done for his benefit. If that general proposition were true, it might be contended, that the defendant must have answered for any accident which might have happened during the preparation of the lime in the lime-burner's yard. Secondly, That the liability of the principal to answer for his agents, is founded in the superintendence and control which he is supposed to have over them. 1 Bl. Com. 431. In the civil law, that liability was confined to the person standing in the relation of *pater-familias* to the person doing the injury. Inst. lib. 4. tit. 5. § 1. Dig. lib. 9. tit. 3. And though in our law it has been extended to cases where the agent is not a mere domestic, yet the principle continues the same. Now clearly it was not in the power of this defendant to control the agent by whom the injury to this plaintiff was effected. He was not employed by the defendant, but by the lime-burner; nor was it in the de-

^d Bush v. Steinman, 1 Bos. & Pul. 404.

fendant's power to prevent him, or any one of the intermediate sub-contracting parties, from executing the respective parts of that business which each had undertaken to perform. The court, however, were of opinion, that the action would lie; and that it was competent to the plaintiff to bring his action either against the person from whom the authority flowed, or against the person by whom the injury was actually committed.

The captain of a king's ship of war is not responsible for the damage done to another vessel through the negligence of his lieutenant^a, although the captain be on board the ship; provided no personal misconduct on the occasion is imputable to the captain.

IV. *Of Actions brought by Masters for enticing away Apprentices and Servants, and for Injuries done to their Servants; and herein of the Action for Seduction—Witness—Damages.*

AN action on the case may be maintained by a master against any person who entices away his apprentice or servant from his service^f, or who continues to employ such servant after notice, though the defendant did not procure the servant to leave his master, or know when he employed him, that he was the servant of another^g. But the master may, if he choose, waive his action for the tort^h, and bring an action of *indebitatus assumpsit* for work and labour done by his apprentice, against the person who tortiously employed him. So the captain of a ship of war detaining an apprentice who had been impressed, after verbal notice by such apprentice of his condition, is liable in an action by the master for wages for the service of the apprenticeⁱ.

It is not material whether the apprentice be legally apprentice or not; it is sufficient if he be so *de facto*^k.

e *Nicholson v. Mounsey*, B. R. E. i *Eades v. Vandeput*, M. 25 G. 3. B. R. 52 G. 3. 5 East, 39. n.
f Adm. per cur. in *Q. v. Daniel*, 6 Mod. k *Barber v. Dennis*, Salk. 68. 6 Mod. 182. 69. S. C. recognized by Ld. Hardwicke, C. J. in *R. v. St. Nicholas*, g *Blake v. Lanyon*, 6 T. R. 221. 1 Burr. S. C. 94, 95.
h *Lightly v. Clouston*, 1 Taunton's Rep. 112.

It has been holden¹, that a master cannot maintain an action for seducing his servant, after the servant has paid him the penalty stipulated by his articles for leaving him.

A master may maintain an action for an injury done to his servant, as false imprisonment, battery, &c. which deprives the master of his service. The form of action is an action of trespass, usually termed an action *per quod servitium amisit*, the gist of the action being the loss of service; and hence the servant may be a witness^a, for he is not interested as to this point.

Of the Action for Seduction.

This form of action is frequently adopted by a parent for the purpose of obtaining a compensation in damages for debauching his daughter (17), and getting her with child, and the expenses attending the lying-in (18). As to the nature of the action, it has been solemnly decided^a, contrary to the opinion expressed by Buller J., ante n. (17), that this is an action of trespass, and not trespass on the case; and consequently that a count for breaking and entering the plaintiff's dwelling house, and debauching his daughter, whereby he lost her service, may be joined with a count omitting the trespass to the dwelling house, and merely stating that the defendant, with force and arms, debauched the plaintiff's daughter, *per quod servitium amisit*. It has been holden, that this action may be maintained, although

¹ Bird v. Randall, 3 Burr. 1345. 1 Bl. R. 387.

^m Jewell v. Harding, T. 10 G. 1. Gilb. Evid. 94. ed. 1761. 1 Str. 595. S. C.

by the name of *Duel v. Harding*. Lewis v. Fog, 3 Str. 944. S. P.

ⁿ Woodward v. Walton, C. B. Trin. 47 G. 3. 3 N. R. 476.

(17) If the injury of seduction is accompanied with an illegal entry of the house of the parent, he has his election either to bring trespass for the breaking and entering, and lay the debauching of the daughter, and loss of her service, as consequential damages, or he may bring an action on the case for debauching his daughter, *per quod servitium amisit*^a.

(18) A master, not standing in the relation of a parent, may maintain this action for debauching his servant. *Fores v. Wilson*, Peake N. P. C. 55. In like manner it may be maintained, for the seduction of an adopted child. *Irwin v. Dearman*, 11 East, 23.

^a Per Buller J. 2 T. R. 167, 168. and Holt C. J. *Ld. Raym.* 1032.

the daughter was of age at the time of the seduction^o. But as the action is founded on the loss of service, that must be alleged in the declaration^p (19); and it must be proved that the relation of master and servant (which in these cases the law implies from very slight circumstances) subsisted at the time when the injury was committed^q, and the circumstance of the daughter having been under age at that time, will not dispense with the necessity of this proof^r. It is not necessary, however, to prove a *contract* for service, if the daughter was in fact a servant. Evidence must be given of *acts* of service, but the slightest evidence will be sufficient, as milking cows^s and the like.

Witness.—The daughter or servant is a competent witness to prove the case.

Plaintiff brought trespass against the defendant for breaking and entering his house^t, and debauching his daughter, by which he lost her service for a long space of time. Upon the trial it appeared, that the defendant was admitted in the way of courtship to visit the young woman; that proposals had been made on both sides; that one night she went to bed, and left her chamber window open, and the defendant, by setting a ladder to her window, got into her chamber, and having lain with her, she became pregnant, and afterwards had a child, whereby the father was put to a great expense. These facts the judge at Nisi Prius admitted the daughter to prove, upon which the jury gave 150*l.* damages. A motion for a new trial was made on the following grounds: 1st, Because the verdict was against evidence, there being no proof of any trespass committed in breaking the house, but on the contrary, that the window having been left open by the plaintiff's daughter, the defendant entered by virtue of a licence from her, and so could not be a trespasser. *Norton v. Jason*, Styl. 398.

^o *Bennet v. Allcott*, 2 T. R. 166.

^r *Dean v. Peal*, 5 East, 45.

^p *Saterthwaite v. Dewhurst*, B. R. E. 25 G. 3. cited in 5 East, 47. n. and MSS.

^s Per Buller J. in *Bennett v. Allcott*, 2 T. R. 168.

^q *Postlethwaite v. Parkes*, 3 Burr. 1878. recognised by Buller J. in 4 T. R. 166.

^t *Cock v. Wortbam*, B. R. M. 10 G. 2. MSS. S. C. shortly reported in Str. 1054.

(19) "Although the daughter cannot have an action, yet the father may, not for assaulting his daughter, and getting her with child, because this is a wrong particularly done to her, yet *for the loss of her service caused by this.*" Per Roll. C. J. *Norton v. Jason*, Sty. 398.

Hunt v. Wotton, T. Raym. 260. 2dly, That the daughter, who was *particeps criminis*, and swearing for her father, and in consequence of that, swearing for herself, was not a competent witness. 3dly, That the damages were excessive, no loss of service having been proved, and the jury mistaken in their assessment of the damages, the girl having since the trial brought another action for breach of the promise of marriage. *Sed per curiam*, as to the first ground, the defendant's entry into the house without the privity of the father or mother, is plainly a trespass; as to the 2d, the daughter was a competent witness, and no more interested in the question than servants in actions brought by their masters for beating them, *per quod* their masters lost their service, in which cases the servants are constantly admitted. 3dly, The damages in this case are far from being excessive; the defendant being admitted in an honourable way, made a very ungenerous use of the acquaintance with the daughter, which is a great aggravation of his offence, and it is hardly possible to estimate the damage of a father under such circumstances; and as to loss of service not having been proved, that was quite immaterial, the rule being, that where the loss of service is the gist of the action, there it must be proved; as in trespass by a master for beating his servant; but where laid only in aggravation of damages, loss of service need not be proved: and here the action is founded on the trespass in breaking the house, and the loss of service is only consequential to it. As to the new action that has been brought, we cannot take any notice of it.

Witnesses cannot be examined on the part of the plaintiff as to the daughter's general character for chastity, except in answer to evidence adduced by the defendant of *general bad character*¹. A specific breach of chastity alleged on the part of the defendant will not afford ground for such examination².

Of the Damages.

Liberal damages are usually given in an action for seduction, and the courts are disinclined to grant new trials merely on the ground of excess in that respect³.

From a laudable desire, as I conceive, to suppress the vice

¹ Bamfield v. Massey, 1 Camp. N. P. C. 460. ² Tullidge v. Wade, 3 Wils. 18. Edmousson v. Macheil, 2 T. R. 4. Bennett v. Allcott, 2 T. R. 166.

of seduction, against which our criminal code has not provided any punishment, many eminent judges have thought it proper to direct juries in ascertaining the amount of the damages in this action, to have regard not merely to the injury sustained by the loss of service, a proper compensation for which might amount to a few pounds only, but also to the wounded feelings of the parent or party standing *in loco parentis*.

In *Southernwood v. Ramsden*, Middx. Sittings after H. T. 19th Feb. 1805, which was an action by a custom-house officer against a cow-keeper, for the seduction of the plaintiff's daughter *per quod servitium amisit*, Lord Ellenborough, C. J. in explaining the nature of this action, said, that it was laid as a trespass, and was founded on the injury done to the father by the loss of the service of the child; this was necessary to let in the case, but when this was established, *farther damages might be conceded for the loss which the father sustained by being deprived of the society and comfort of his child, and by the dishonour which he receives*. The jury gave 300*l.* damages. Lord Eldon C. J. had expressed a similar opinion at Bristol Summer Assizes, 1800, in the case of *Chambers v. Irwin*, where the action was brought by an aunt, for the seduction of her niece, against the defendant, a lieutenant in the navy. The chief justice told the jury, that in calculating the quantum of damages, they were not to look merely to the loss of service, which might amount only to a few pounds, but also to the *wounded feelings* of the party. The jury gave 200*l.* damages.

From the amount of the damages in the preceding cases, it will be observed, that due respect was paid by the jury to the direction of the judge. It may be remarked, that although this practice of giving damages for the *wounded feelings* of the party can scarcely be reconciled with the strict rule of law, which entitles a person to recover only *secundum allegata & probata*, yet when the nature of the vice of seduction, and the pernicious consequences which result from it are duly considered, few persons (however anxious they may be that the boundaries between civil injuries and criminal offences should be preserved as distinct as possible) will regret that such a practice has been adopted.

Since the publication of the preceding remarks an application was made to the court of B. R. to set aside an inquiry on the ground of excessive damages*, where the

* *Irwin v. Dearman*, B. R. E. 49 G. 3. MS. and 11 East, 23.

plaintiff had declared against the defendant for the seduction of his adopted daughter and servant, and the jury had given 100*l.* damages, although it appeared that the only pecuniary damage which the party had sustained, was the being obliged to hire another servant for five weeks during the lying-in. The plaintiff had been a serjeant in a regiment of the line, and the servant was the daughter of a deceased comrade, whom the plaintiff had adopted and maintained. It was urged, that she could only be considered as a servant; and a case was cited as having being tried before Chambre J. at Worcester, where, upon an action brought by a father for the seduction of his natural daughter, that learned judge told the jury they must consider her merely in the character of a servant, and award the plaintiff a compensation for the loss of service only: The court, however, in the present instance refused the application, *Ld. Ellenborough, C. J.* observing, that the courts had uniformly expressed their reluctance to disturb the verdict in this action, merely on the ground of excessive damages, and referred to *Edmonson v. Machell, 2 T. R. 4.*—that it was a case *sui generis*, where, in estimating the damages, the parental feelings, and the feelings of those who stood in *loco parentis*, had always been taken into consideration; and although it was difficult to conceive upon what legal principles the damages could be extended *ultra* the injury arising from the loss of service, yet the practice was now inveterate and could not be shaken. He added^a, that the action having been considered in *Edmonson v. Machell* to extend to an aunt, as one standing in *loco parentis*, he thought that the present plaintiff, who had adopted and bred up the daughter of a friend and comrade from her infancy, seemed to be equally entitled to maintain the action on account of the loss of service to him, aggravated by the injury done to the object on whom he had thus placed his affection.

^a 11 East, 24, 5.

C H A P. XXX.

NUSANCE.

- I. *In what Cases an Action for a Nuisance may be maintained.*
 - II. *By whom and against whom an Action for a Nuisance may be maintained.*
 - III. *Evidence, &c.*
-

I. *In what Cases an Action for a Nuisance may be maintained.*

AN action on the case lies for a nuisance to the habitation or land of another; as, if A. build an house so as to hang over the land of B., whereby the rain falls upon B.'s land, and injures it, B. may maintain an action against A. for this nuisance^a. So if the owner of the adjacent land erects a building so near the house of the plaintiff as to prevent the air and light from entering and coming through the plaintiff's windows, an action will lie.

Formerly it was holden, that a party could not maintain an action for a nuisance of this kind, unless he had gained a right in the lights by prescription^b. (1), and in conformity

^a Pearuddock's case, 5 Rep. 100. b. 1 ^b Bowry v. Pope, 1 Leon. 168. Cro. Rel. Abr. 107. pl. 18. 2 Rel. Abr. Eliz. 118. S. C.
140. pl. 11.

(1) But if the owner of land had built a house on part of the land, and afterwards sold the house to one person, and the adjacent land to another, the vendee of the house might maintain an action against the vendee of the land for obstructing his lights, although the house was not an ancient house, because the law would not per-

with this rule, it was usual to state in the declaration that the house was an ancient house, wherein were ancient windows, through which the light had entered, and had been used to enter, from time immemorial^c (2). But the modern doctrine (which was first laid down by Wilmot J.^d, and has been acted upon ever since) is, that upon evidence of an adverse enjoyment of lights for twenty years or upwards, unexplained, a jury may be directed to *presume* a right by grant or otherwise. But if the period of enjoyment falls short of twenty years, then other circumstances than the mere length of time must be brought in aid, in order to raise the presumption of the plaintiff's right (3). Upon this principle of presuming a right by grant, &c., from length

c See Co. Ent. tit. Action sur le Case, pl. 17.

d Lewis v. Price, Worcester Sum. Ass. 1761, coram Wilmot J. Dougal v. Wilson, C. B. T. 9 G. 3. Darwin v.

Upton, B. R. M. 26 G. 3. These cases are reported in 2 Wms. Saund. 175. a. See also Hubert v. Groves, 1 Esp. N. P. C. 148.

mit the vendor, and by consequence no person claiming under him, to derogate from his own grant. *Palmer v. Fletcher*, 1 Lev. 122. In cases of this kind, it is obvious, that, as the plaintiff could not aver and prove that the house was an ancient house, such allegation and proof must have been deemed unnecessary. See *Cox v. Mathews*, 1 Ventr. 237.

(2) Against this prescription a contrary prescription to obstruct the lights could not be alleged. 9 Rep. 58. b. But by the custom of London, every citizen, upon an ancient foundation, may build a house as high as he pleases. *Anon. Comyns' R.* 273.

(3) The same rule holds in respect to other easements. An adverse enjoyment of a right of way for twenty years unexplained, is evidence sufficient for the jury to found a presumption that it was a legal enjoyment. *Campbell v. Wilson*, 3 East, 294. In an action upon the case for obstructing a way which the plaintiff claimed over defendant's close, it appeared, that there had been an absolute extinguishment of the right of way some years ago, by unity of possession; but the way having been used for thirty years preceding the action, Yates J. directed the jury to presume a grant from the defendant. *Keymer v. Summers*, Bull. N. P. 74. cited in 3 T. R. 157.

Independently of any particular enjoyment which another has been accustomed to have*, every person is entitled to the benefit of a flow of water in his own land, without diminution or alteration; but an adverse right may exist founded on the occupation of another; and although the stream be either diminished in quantity, or

* Per Ld. Ellenborough C. J. in *Beeley v. Shaw*, 6 East, 214. See also *Balston v. Bensted*, 1 Camp. N. P. C. 463.

of possession, it has been usual to insert in the declaration a count, with a general description of the house and windows, not stating them to be ancient (4).

Total privation of light is not necessary to sustain the action. If the plaintiff can prove, that by reason of the obstruction he cannot enjoy the light in so free and ample a manner as he did before, it will be sufficient*.

It would be an endless task to enumerate all the instances of nuisance, for which an action may be maintained. It may be sufficient to observe, that the erection of any thing offensive so near the house of another, as to render it useless and unfit for habitation, *e. g.* the erection of a swine-stye^f, lime-kiln^g, privy^h, smith's forgeⁱ, tobacco mill^k, or the like, is actionable. The principle on which the rule of law proceeds is, *sic utere tuo, ut non lædas alienum*^l, "enjoy your own property in such a manner, as not to injure that of another person." It must not, however, be inferred, from the

e *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69.

f *Aldred's case*, 9 Rep. 59. a.

g *Per Wray C. J.*, S. C.

h *Jones v. Powell*, Hutt. 136.

i *Bradley v. Gill*, Lutw. 69.

k *Styan v. Hutchinson*, London Sit-

tings, after *M. T. 40 G. 3. B. R.*

Kenyon C. J. MSS.

l 9 Rep. 59.

even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it hath existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. Twenty years exclusive enjoyment of the water, in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of Parliament. But less than twenty years' enjoyment may or may not afford such a presumption, accordingly as it is attended with circumstances to support or rebut the right. So the presumption of a right by prescription to a pew, founded on long enjoyment, may be rebutted by shewing the time when the pew was originally built. *Griffith v. Matthews*, 5 T. R. 296. N. "A seat in a church may be annexed to a house, either by a faculty or prescription; and from long uninterrupted usage a faculty may be presumed." *Per Buller J.*, S. C.

(4) Formerly, indeed, the omission of the word ancient was cured by verdict, in cases where it was alleged in the declaration, *quod lumen inferri consuevit*, because from those words the court would intend, that a prescription had been given in evidence. *Rosewell v. Prior*, *Ld. Raym.* 392. *Salk.* 459, 460. *Carth.* 454. So *quod de jure viam habuit* was holden good after verdict, without other words of prescription. *St. John v. Moody*, 2 Lev. 148.

preceding remarks, that an action can be maintained for a *thing* done merely to the *inconvenience* of another.

The building a wall which merely intercepts the prospect of another, without obstructing the light, is not actionable^m.

In an action on the case against defendant, for keeping dogs so near plaintiff's dwelling-houseⁿ that he was disturbed in the enjoyment thereof, it appeared in evidence, that defendant kept six or seven pointers so near plaintiff's dwelling-house, that his family were prevented from sleeping during the night, and were very much disturbed in the day-time. There was not any evidence given on the part of the defendant, notwithstanding which the jury found a verdict for defendant. On a motion for a new trial, Lord Kenyon, C. J. said, "I know it is very disagreeable to have such neighbours, but we cannot grant a new trial. Cases certainly of this nature have been made the subject of investigation in courts of justice: I remember a case in Peere Williams^o, "where the plaintiff's house being so near the church, that the five o'clock morning bell disturbed her, the plaintiff came to an agreement with the churchwardens, that she should erect a cupola and a clock, and in consideration thereof the five o'clock bell should not be rung. This was considered as a good agreement, and the chancellor decreed an injunction to stay the ringing the bell." If the defendant continues the nuisance, and you think it advisable, you may bring a new action." Rule refused.

An action cannot be maintained for a reasonable use of a person's right, although it may be to the annoyance of another; as if a butcher, brewer, &c. use his trade in a convenient place^p.

For a nuisance in a public highway, an *action* cannot be maintained, unless there be special damage^q; and mere obstruction of the plaintiff's business^r, or delaying him a little while in a journey^s, is not such special damage as will sustain an action; for the damage ought to be direct^t, and not consequential; *e. g.* the loss of a horse, or some corporal hurt, as falling into a trench, &c. (5); and the party

^m Per Wray C. J. 9 Rep. 58. b. Knowles v. Richardson, 1 Mod. 55.

ⁿ Street, clerk, v. Tugwell, B. R. M. T. 41 G. 3. MSS.

^o Martin v. Nutkin, 2 P. Wms. 268.

^p Com. Dig. action upon the case for nuisance (C).

^q 1 Inst. 56. a.

^r Hubert v. Groves, 1 Esp. N. P. C. 148.

^s Per Cur. Carth. 191.

^t Per Cur. in Paine v. Partrich, Carth. 191.

(5) The grantee of an occupation way may maintain an action

must have used common and ordinary cautionⁿ. If the immediate and proximate cause of damage be the unskilfulness of the plaintiff, he cannot recover. As where it appeared^r that some bricklayers employed by the defendant had laid several barrows full of lime rubbish before the defendant's door; the plaintiff was passing in a single horse chaise; the wind raised a whirlwind of the lime rubbish, and that frightened the horse, which usually was very quiet; he started on one side, and would have run against a waggon which was meeting them, but the plaintiff hastily pulled him round, and the horse then ran over a lime heap lying before another man's door; by the shock the shaft was broken; and the horse being still more alarmed by it, ran away, and upset the chaise, and the plaintiff was thrown out and hurt. It was holden, that as the immediate and proximate cause of the injury was the unskilfulness of the driver, the action could not be maintained.

Whether the damage stated be sufficient to maintain the action, is frequently the subject of controversy (6).

The plaintiff declared^r, that he was entitled to certain tithes, and that his direct way to carry them to his barn was through a certain highway; that the defendant had stopped up the highway by a ditch and gate erected *ex transverso viæ*; and that by reason of such obstruction, he (the plaintiff) was forced to carry his tithes by a longer and more difficult way; verdict for the plaintiff, and 5*l.* damages. It was moved in arrest of judgment, that this being laid in a common highway, the obstruction was a common nuisance, and that therefore the action would not lie; and 1 Inst. 56. was cited; but it was resolved by the court, that the action was maintainable; for they said, that this rule, "that the action will not lie for that which every one suffers," ought not to be taken too largely; in this case the plaintiff had sustained a particular damage; for the labour and pains which he was forced to take with his cattle and servants, by reason of the obstruction, might be

ⁿ Butterfield v. Forrester, 11 East, 60.
^r Flower v. Adam, 2 Taunt. 314.

^y Hart v. Bassett, T. Jones, 156.

against the owner of the land over which the way leads for obstructing it, without proving special damage, although it appear that such way has been used by the public for twelve years and upwards. Allen v. Ormoud, 8 East, 4.

(6) See an useful note on this subject by Durnford. Willes, 74.

of more value than the loss of a horse, which had been holden to be sufficient damage to maintain such action.

This case was recognised in *Chichester v. Lethbridge, Willes, 73.* where the declaration was similar to the foregoing, with this addition only, that defendant opposed the plaintiff in attempting to remove the nuisance.

Where there is direct special damage, an action on the case lies for not repairing^a, as well as for a nuisance in a highway, if an individual is liable to repair; but otherwise, where the county or parish is to repair the highway^a.

If the proprietor of tithes permit them to continue upon the soil^b, the land-owner may maintain an action, and recover damages against the tithe-owner, for having suffered the tithe to remain on the land more than a reasonable time after it was set out, to the detriment of the herbage (7).

But this action cannot be maintained, if the tithe has not been duly set out; *e. g.* if the tithe of wheat has been set out in shocks or riders as they are termed in the north of England, instead of being set out in the sheaf^c as the common law requires; or if the tithe of hay has been set out in the swath, instead of being set out in the cock^d; or if it be set out in grass cocks without having been tedded.

In an action against the defendant for neglecting to take away the tithes of hay, from the plaintiff's ground after the same had been *duly* set out, and notice given to defendant, by the plaintiff^e, it appeared in evidence, that the tithes were set out from the swath into grass cocks without any tedding or making of the same; whereupon Heath J. nonsuited the plaintiff, on the ground that the plaintiff ought first to have tedded the grass. On motion to set aside the nonsuit, the court of B. R. were of opinion, that Heath J. had correctly laid down at the trial the common law principle as applied to this case; *Ld. Ellenborough, C. J.* observing, "the rule is for the rector to take his 10th part in

^a 1 Inst. 56. a. n. (2.) Hargrave's ed. ^c *Shallcross v. Jowle*, 19 East, 961.
^b *Russell v. Men of Devon*, 3 T. R. 671. ^d *Mayes v. Willet*, 3 Esp. N. P. C. 31.
^e *Newman v. Morgan*, 10 East, 5.
^b Admitted, 8 T. R. 72.

(7) The land-owner may also distrain the tithes damage feasant. *Adm. per Ld. Kenyon, C. J.* 8 T. R. 76.; but he cannot justify turning in his cattle on the land, and thereby consuming the tithe. *Williams v. Ladaer*, 8 T. R. 72.

that first convenient stage of the process, when the subject matter may be equally divided, and that is when it is put into grass cocks in the common process of hay-making: and it is agreed on all hands, that the usual course is for the grass to be tedded after it is cut, before it is made into grass cocks. This may possibly not be necessary under extraordinary circumstances of weather; but where that is so, it ought to be shewn. Le Blanc J. added, that the subject matter was not in a proper state to be tithed, until it came into grass cocks, in the ordinary course of the process of making it into hay; that is, by first turning over the swath, after it has been cut, that the under side may be exposed to the action of the sun and air, which he took to be tedding it; and in that state only (he did not speak of extraordinary cases) can it properly be put into grass cocks. The same rule of law had been recognised in *Blaney v. Whitaker*, B. R. M. 23 Geo. 3. That was an action on the case against the parson for not taking away the tithe of turnips after they had been set out. The turnips had been drawn to feed cattle, and every tenth turnip was thrown aside as drawn on a ridge opposite for the parson. The question was, whether the tithe were properly set out? the parson contending, that the turnips ought to be set out in heaps, or at least gathered into heaps for him. Mr. Justice Ashhurst said, that in hay and corn, the farmer must put it into cocks and sheaves for his own benefit, and therefore he shall do the same for the parson: but that a man was not obliged to bestow more labour than the nature of the thing required for the benefit of the parson: and that this agreed with the cases. Mr. Justice Buller said, that he entirely agreed with his brother Ashhurst. That if the farmer put them into heaps for himself, he should do so for the parson; but if he did not do so for himself, he need not do so for the parson. That the rule of law was, that things should be tithed as soon as they were in a proper state to be tithed; the same was the case with hay and corn.

In a subsequent case of *Halliwell, Clk. v. Trappes*, C. B. Trin. 49 G. 3. 2 Taunt, 55. from York assizes, it appeared, that on the same day on which the grass was cut, the owner tedded it abroad, and on collecting it together again into what were in that country called lap-cocks or foot-cocks, he set out every tenth cock. It was admitted, that the grass in that state was not fit to put into a stack, it was neither hay nor grass; and when the land-owner's hay was again spread out, there was not room for the tithe owner to spread out his tithe to dry without treading on the hay of the land-

owner: as much space, however, was left for spreading out the tithe as the ground that the tithe had grown upon. It was holden by Lawrence, J. at the assizes, and afterwards by the court, that the tithe was duly set out. It was adjudged also in the same case that the common law mode of setting out the tithe of corn is in the sheaf and not in the shock^f.

There is another general rule on this subject which ought to be mentioned, viz. that the tithe ought to be so set out, and the nine parts left so long that the parson may have an opportunity of judging by the view, whether the tithe is fairly set out or not^g (8). Corn must be tithed in the first convenient state in which the tithe can be collected after the corn is cut, which is in sheaves; and if the farmer adopt any mode of tithing, which excludes or abridges the due means of the parson's comparing the tenth sheaf with the other nine, it is bad.

II. *By whom and against whom an Action for a Nuisance may be maintained.*

If the nuisance be to the damage of the reversionary as well as the possessory interest, an action may be brought as well by the reversioner^h as by the tenant in possession, and each will be entitled to recover damages commensurate with the injuries, which their respective interests may have sustained.

If the house, &c. affected by the nuisance be aliened, the alienee, *after request made* to remove or abate the nuisance, may maintain an action for the nuisanceⁱ.

Tenants in common *may* join in an action to recover da-

^f *Shallcross v. Jowle*, B. R. H. 51 G. 3. ^h *Bedingfield v. Onslow*, 3 Lev. 209.
 13 East, 261. S. P. *Leader v. Moxon*, 8 Wils. 461. 2 Bl.
^g Admitted per Cur. in *Halliwell v.* R. 924. S. C.
 Trappes, 2 Taunt. 59. ⁱ *Penruddock's Case*, 5 Rep. 101. a.

(8) The same point was adverted to in *Shallcross v. Jowle*, where it seemed to be the opinion of the court, that after the land-owner had set apart the tenth sheaf, he ought to allow the remaining nine sheaves to remain on the ground a convenient time before he put them up into shocks, in order that the tithe-owner might have an opportunity of judging whether his tithe had been fairly set out.

damages for a nuisance, which concerns the tenements which they hold in common.

The action may be maintained against the person who erects the nuisance, or his alienee^k, who permits the nuisance to be continued. If the party, against whom a verdict in an action of this kind has been recovered, does not abate the nuisance, another action may be brought for continuing the nuisance, in which the jury will be directed to give large damages. N. It is usual, in the first action, to give nominal damages only, which, however, entitle the plaintiff to full costs.

Tenant for years erected a nuisance^l, and afterwards made an under-lease to I. S. The question was, whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance, after he had made an under-lease? *Et per cur.* it lies; for he transferred it with the original wrong, and his demise affirms the continuance of it: he hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions. Vide Wm. Jones, 272. Receipt of rent is upholding. Cro. Jac. 373. 555. The action lies against either at the plaintiff's election.

III. Evidence, &c.

THE plaintiff must be prepared to prove his possession of the land, house, &c. affected by the nuisance, and the continuance or erection of the nuisance by the defendant, as the circumstances of the case may require, and also the injury thereby sustained.

Where the plaintiff complains of an injury to an easement^m, it will be incumbent on him (unless he can shew an express grant) to carry his evidence of the condition of the land, &c. and the enjoyment of the right, as far back as possible, in order to raise a presumption of right by grant or prescription.

This action being local in its nature, the nuisance must be proved to have been committed in the county where the venue is laidⁿ. But it is not necessary that the gravamen should be described with any local certainty^o. It is suffi-

^k 5 Rep. 100. h.

^l Rosewell v. Prior, Salk. 460.

^m Peake's Evid. 294.

ⁿ Warrel v. Webb, 1 Taunt. B. 379.

^o Mersey and Irwell Navigation v. Douglas, 2 East, 497. See also Jeffries v. Duncombe, 11 East, 286.

cient if the declaration point out the gravamen with certainty enough to enable the defendant to have notice of it.

The general issue to an action for a nuisance is, *not guilty*, under which every thing that shews that the defendant did what he lawfully might do, may be given in evidence (9).

Hence the defendant may prove that the plaintiff gave him leave to do the act which occasioned the nuisance⁹, and that it was done under that permission; for a licence executed is not countermandable.

p Winter v. Brockwell, 8 East, 308.

(9) "Evidence upon the general issue has of late been allowed in many cases, which in former times would not have been admitted." Per King, C. J. Anon. C. B. E. 4 Geo. 1. Comyns' R. 274.

CHAP. XXXI.

PARTNERS.

- I. *What is necessary to constitute a Partnership.*
 - II. *How far the Acts of one Partner are binding on his Co-partners.*
 - III. *Of Actions by and against Partners.*
 - IV. *Evidence.*
-

I. *What is necessary to constitute a Partnership.*

IN order to constitute a complete partnership, as well between the parties as in respect to strangers who may deal with them, a communion or participation of profits and loss is essential. The shares of the parties must be joint, though it is not necessary that they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners.

A. for himself and his two partners^a (who were general merchants), B. for himself and partner (who were oil merchants), C. for himself and son (who were also oil merchants), agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise. A. was to be the ostensible buyer, and the others were to share in his purchase, at the same price which he might give. A. and Co. were to have a half, B. and Co. a quarter, and C. and Co. the remaining quarter. In pursuance of this agreement A. and Co. ordered a broker to buy quantities of oil. The broker accordingly bought several ship loads, and among the rest a ship load from the plaintiffs. To some of the vendors, (plaintiffs in this action,) B. and Co. and C. and Co., during the treaty, declared it to be a com-

^a Coppe and others v. Eyre and others, 1 H. Bl. 37.

mon concern between them and A. and Co.; but, with respect to the plaintiffs, the purchase was made in the name of A. and Co. only, without any notice that the other defendants had any concern in it. The majority of the court, viz. Heath J., Gould J., and Lord Loughborough C. J. were of opinion that B. and Co. and C. and Co. were not to be considered as partners with A. and Co., on the ground that there was no communion of profit and loss. Each party was to have a distinct share of the whole; the one to have no interference with the share of the other, but each to manage his share as he judged best. The profit or loss of the one might be more or less than that of the other. This was a sub-contract, by which was to be understood a contract subordinate to another contract, made or intended to be made, between the contracting parties on one part, or some of them, and a stranger. A. and Co. were the only purchasers known to the plaintiffs; entire credit was given to them alone. The contracts made with the other merchants were not admissible evidence in this cause, except to prove a fraud, if the facts had gone that length; namely, that the house of A. and Co., as a failing house, was to stand forward in order to protect the other defendants, who, by such means, might have the benefit of the speculation, if it proved fortunate, without sustaining any loss in the event of its failing. No such evidence had been adduced; on the contrary, it appeared, that the objection made by the other vendors to the firm of A. and Co. was, "*that they were unknown and new in the trade.*" Wilson J. differed in opinion from the rest of the court, observing, that although the contract was actually made between the plaintiffs and A. and Co., yet if the other defendants were jointly concerned in it, they ought to be responsible, as much as if they had personally contracted; that they were so concerned, sufficiently appeared from the contracts with the other merchants, and their own declarations; these he thought were proper to be given in evidence, being against themselves.

A father established in business^b, on his son's coming of age, told him, he should have a *share* in it, and held him out to the world as his partner: the son acted as such for several years, but the particular share which the son was to have was not settled; it was holden, that as there was a partnership as between the parties and the rest of the world, the presumption of law was, that they were partners *inter se*. That this presumption not having been repelled, the son, though not entitled to a moiety, was entitled to a *share*

^b Peacock v. Peacock, 2 Camp. N. P. C. 45.

of profits; but it was left to the jury to consider what was a fair and just proportion for the father to give, and the son to expect: the jury found that the son was entitled to a fourth part of the profits.

In respect of creditors, he, who takes a moiety of all the profits indefinitely, shall by operation of law, be made liable to losses, if losses arise; upon the principle, that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.

A. and B. ship-agents at different ports^c, entered into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. It was, however, expressly stipulated, between A. and B., that they were not to be answerable for each other's losses. It was holden, that although, with respect to each other, these persons were not to be considered as partners under this agreement, yet they had made themselves such with regard to all persons with whom either contracted as a ship agent.

The distinction taken in the preceding case as to an agreement not constituting a partnership as between the parties themselves, though it may have that effect, quoad third parties, was recognised in the following case: A. having neither money nor credit^d, offered to B. that if he would order with him certain goods to be shipped upon an adventure, if *any profit should arise from them, B. should have half for his trouble*; B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone; it was holden, that B. was entitled to recover back such payment in assumpsit against A., who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit, though B. were liable as a partner to third persons creditors.

A. B. and C. the proprietors of a stage-coach dividing the general profits of the concern^e, agreed that they should each work the coach a stage with horses, their separate property, and maintained respectively at their separate expense; it was holden, that B. and C. were not jointly liable as co-partners with A. for the price of hay furnished at A.'s request for the use of the horses which were his separate property,

Waugh v. Carver, 2 H. Bl. 235.
Hesketh v. Blanchard, 4 East, 144.

^c Barton v. Hanson and others, 2 Taunt. 49.

but were kept by him for the purpose of working the coach the stage allotted to him under the agreement. N. It did not appear in what manner, upon an adjustment of the accounts, the hay furnished to the different horses was paid for; whether as part of the general outgoings, or separately by each party.

A. was employed by B.^f to sell goods, and was to receive for his trouble whatever money he could procure for them beyond a stated sum; this was holden not to constitute a partnership between A. and B. as to these goods. So where A. having purchased two bullocks^g, put them to depasture upon the lands of B., under an agreement that, after they had been fatted, the profit to be made upon the resale, above a certain sum (at which A. then valued the bullocks), should be equally divided between A. and B. It was holden that A. and B. were merely partners in the profits, and that this was a mode of paying B. for the pasture; consequently A. might maintain an action in his own name, without joining B., to recover the price of the bullocks from a person to whom he had sold them. So where there was an agreement between A., the sole owner of a lighter, and B. a lighterman^h, that B. in consideration of working the lighter should have half her gross earnings, Lord Ellenborough was of opinion, that as this was only a mode of paying B. wages for his labour, and differed from a participation of profits and loss, it did not constitute a partnership.

II. *How far the Acts of one Partner are binding on his Co-partners.*

A GENERAL partnership agreementⁱ, though under seal, does not authorise the partners to execute deeds for each other, unless a particular power be given for that purpose. But although one partner cannot bind the other partners *by deed*, without an authority by deed, yet in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted, but that one partner might bind the rest^k, even without their knowledge or assent. A new partner, how-

^f Benjamin v. Porteus, 2 H. Bl. 590. ⁱ Harrison v. Jackson and others, 7 Wjsh v. Small, Devon Spring Ass. T.R. 207.
^g 1808, coram Thomson B. 1 Camp. ^k See ante tit. Bills of Exch.
 N. P. C. 331.

^h Dry v. Boswell, 1 Camp. N. P. C. 329.

ever, cannot be bound in this manner for an old debt incurred by the other partners, before the new partner was taken into the firm: this was established in the case of *Sheriff v. Wilks*, 1 East, 48. There the plaintiffs had sold a quantity of porter to A. and B., who were then partners, which porter was entered in the plaintiffs' books in the names of A. and B.; and the same was afterwards shipped for the West Indies, and the defendant B. paid the shipping charges. Six months afterwards C. became a partner with A. and B., and continued so for a few months, when their partnership was dissolved. The defendant B., previous to the dissolution of the partnership, sent to the plaintiffs a memorandum or calculation, in his own hand-writing, of certain deductions claimed by him in respect of the porter. The plaintiffs drew a bill upon the defendants for the balance. This bill was accepted by A. in the partnership firm of all the defendants, by his subscribing thereon, "Accepted, A. and Co." An action having been brought by the plaintiffs against A. B. and C. upon the acceptance; and A. and C. having been outlawed, B. pleaded the general issue: it was holden, that the plaintiffs could not recover, *Le Blanc J.* observing, "that this case must be determined in the same manner as if C. had pleaded to the action. It seemed admitted, that if one of several partners pledge the partnership fund for his individual debt, that would not bind the rest. And he saw no difference between the case of one, and the case of two, of several partners pledging the joint fund for their individual debts, which was the case before the court." The point above alluded to by *Le Blanc J.*, viz. that one partner cannot pledge the security of another for his own private debt, appears to have been expressly decided in two cases referred to by Mr. East, in a note to the foregoing decision, viz. in *Gregson and others v. Hutton and another*, B. R. E. 22 Geo. 3. and in *Marsh v. Vansommer and another*, London sittings after Mich. T. 1786, cor. *Buller J.* See also *Swan v. Steele*, ante p. 274.

Where one of several partners¹ commits an act of bankruptcy, which is afterwards followed up by a commission and assignment, he has no longer any property in the partnership effects; but the property is, from the time of such act of bankruptcy, in his assignees by relation, and in the solvent partners.

It may be observed, that the general authority of one partner to draw bills or promissory notes to charge

¹ Bayley J. 10 East, 426.

another is only an implied authority^m: and consequently that implication may be rebutted; for it is not essential to a partnership, that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others.

If one of two partners commit a secret act of bankruptcyⁿ, the other partner may, for a valuable consideration, and without fraud, dispose of the partnership effects; and though he himself afterwards become bankrupt, the assignees, under a joint commission, cannot maintain trover against the *bonâ fide* vendee of such partnership effects. One of three partners^o gave directions for bringing an action in the name of all, in which a bail bond was given to the sheriff: the other two partners came into court, and agreed that common bail should be accepted in the action, and that the proceedings should be staid for six weeks. On motion to discharge the agreement, made by the two partners, the court said, that one of the plaintiffs might entirely discharge the action by a release, it being in the personality; and a majority at least of them might accept terms and agree to suspend the proceedings. And Probyn J. said, he saw no reason why even one of the partners should not bind the rest by any agreement concerning the cause, because if he should do any thing against the articles of partnership, he must be answerable for it in a proper manner. So nothing was taken by the motion. Where one of two partners^p, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him and the seller, this is to be considered as a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties.

^m Gallway v. Mathew and another, 10 East, 264.
ⁿ Fox v. Hanbury, Cowp. 449.

^o Hardwood v. Edwards, B. R. T. T. 13 Geo. 2. MSS.
^p Bond v. Gibson and another, 1 Camp. N. P. C. 185.

III. *Of Actions by and against Partners.*

If three partners (two of whom reside abroad^a and one in England) be sued for a partnership debt, and the partner resident in England appear to the action, but refuse to appear for the partners resident abroad, the sheriff, under a *distringas* against the two partners, may take partnership effects, though paid for by the partner resident in England alone, to whom the partnership was legally indebted; and the court will not relieve him against such distress.

In an action by partners for the non-performance of a contract entered into with the partnership, it is essentially necessary that the action should be brought in the joint names of all the persons of whom the partnership consisted at the time the contract was made (1), otherwise the parties suing will be liable to be non-suited for the omission of their co-partners (2). The same rule formerly held with respect to

q *Morley v. Strombom & al.*, 3 Bos. & Pul. 254.

(1) Subsequently admitted partners, though under an agreement to share in profit and loss, from a time antecedent to the contract, ought not to be joined. *Wilsford v. Wood*, 1 Esp. N. P. C. 180. *Ld. Kenyon C. J.*

(2) In one case, where an action was brought in the names of two persons, with whom the defendants had dealt as partners, and it appeared that at the time of the contract there was in fact another partner, who had, however, withdrawn his name from the firm, but still continued to receive part of the profits; although it was objected that the dormant partner ought to have been joined, *Ld. Kenyon C. J.* is reported to have refused to nonsuit the plaintiffs. *Leveck v. Pollard* and another, 2 Esp. N. P. C. 468.

So where in an action^b brought by A. for goods sold and delivered, it appeared that B., who proved the delivery and value of the goods, was the principal manager of A.'s trade: and that he received for his services a certain salary, and besides that, a certain proportion *per cent.* on the profits of the plaintiff's whole trade, and inclusively on the profits of the demand in question; it was holden, that A. might sue alone, and that it was not necessary that B. should be joined with the plaintiff. So where an action was brought by Mawman[†], a bookseller, against the printer, for not insuring the Travels of Anacharsis; and it appeared that several other booksellers, and amongst them Evans, a witness,

^a *Lloyd v. Archbowl*, 2 Taunt. 324.

[†] *Mawman v. Gillet*, cited by Sir J. Mansfield, C. J. 2 Taunt. 325.

actions brought *against* partners, and plaintiffs were frequently non-suited for not naming *all* the partners as defendants. This rule was considered as oppressive, inasmuch as it was not possible for the plaintiffs in many cases, without the assistance of a bill of discovery, to ascertain the names of all the persons constituting the firm with which they had had dealings. On this ground the rule was departed from in the time of Lord Mansfield, and it was then laid down that defendants should be permitted to take advantage of this objection by a plea in abatement only. The rule laid down by Lord Mansfield has been acted upon ever since, though the Court of Common Pleas have lately manifested a strong disposition to revert back to the ancient rule. The liability of the parties depends upon their being partners at the time when the contract is made*, and a dormant partner cannot set up the plaintiff's ignorance of his being a partner, to obviate such liability. But in a case where there was a stipulation between three persons who appeared to the world as partners*, that one

* See *Ld. Kenyon's* opinion in *Saville v. Alderson v. Pope*, 1 Camp. N. P. C. v. *Robertson*, 4 T. R. 725. 404. n.

had a share in the work ; but inasmuch as Evans had never contracted with Gillett, but Mawman was the only ostensible man, the court held that he was the only proper plaintiff, and with good reason, for the only acting partner might owe much money to the defendant, which the defendant might set off; but if the plaintiff and the dormant partner had sued, that debt of the acting partner could not be set off. "There is a material distinction between the case where partners are defendants, and where partners are plaintiffs: if you can find out a dormant partner defendant, you may make him pay, because he has had the benefit of your work; but a person with whom you have no privity of communication in your contract, shall not sue you." But where a merchant, carrying on trade on his own separate account, introduced into his firm the name of a clerk, who did not partake in the profits of the business, but continued to receive a fixed salary, Lord Ellenborough held*, that in an action on a bill of exchange, payable to the order of this firm, the clerk ought to have been joined as a plaintiff, for he was to be considered in all respects as a partner as between himself and the rest of the world; that where the name of a real person is introduced with his own consent, it is immaterial what agreement there may be between him and those who share the profit and loss—they are equally responsible, and the contract of one is the contract of all.

* *Guiston v. Robson*, 2 Camp. N. P. C. 302.

of them should not participate in the profit and loss, and should not be liable as a partner, it was holden, that he was not liable as such to persons who had notice of this stipulation.

IV. *Evidence.*

Acts subsequent to the time of delivering goods on a contract, may be admitted as evidence to shew that the goods were delivered on a partnership account, if it were doubtful at the time of the contract; but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods), will make him liable in an action for goods sold and delivered, though he will be liable in an action on the bill of exchange.

It is incumbent on persons dissolving a partnership², to send notice of such dissolution to all the persons with whom they have had dealings in partnership. The Gazette of itself is not sufficient notice of such dissolution. It seems, however, that in respect of persons who had not any previous dealings with the partnership, an advertisement in the Gazette would be sufficient notice of the dissolution, so as to prevent such persons from recovering against the parties who constituted the firm originally, upon a security given by one of the parties in the name of the firm, after such notice of dissolution³.

Assumpsit for goods sold and delivered⁴. The plaintiff's witness swore that the defendant and I. S. were partners in trade, and that these goods were sold to them in partnership. The defendant called I. S. to prove that the goods were sold to him, and that the defendant had no concern in the purchase of them, otherwise than as his servant. *Ld. Kenyon C. J.* "He is not a witness to prove this, for he comes to defeat the action of the plaintiff, against a man

² *Saville v. Robertson*, 4 T. R. 730.

³ *Graham v. Hope*, *Peake's N. P. C.*

154. See also *Gorham v. Thompson*, *Peake's N. P. C.* 43.

⁴ *Godfrey v. Turnbull and another*, 1 Esp. N. P. C. 371.

⁵ *Goodacre v. Brame*, *Peake's N. P. C.* 174.

who is proved to be his partner; and by discharging the present defendant he benefits himself, as he will be liable to pay a share of the costs to be recovered by the plaintiff in this cause."

In an action against one partner^a, if the plaintiff gives in a particular of his demand, and the defendant pleads partnership in abatement, if the defendant proves any of the items to have been furnished on the partnership account, he will be entitled to a verdict, although the plaintiff should be prepared to prove that some of the items were furnished on the credit of the defendant only.

In an action against the drawers of a bill of exchange^a, purporting to be drawn by a firm upon one of the partners constituting the firm, if it be proved that the bill was accepted by such drawee, this will be sufficient evidence of the bill having been regularly drawn; and further, it is not necessary, in such case, to prove that the drawers received express notice of the dishonour of the bill, because this must necessarily have been known to one of them, and the knowledge of one is the knowledge of all (3).

To establish a partnership between two defendants^b, a verdict on an issue directed out of a court of equity, to try whether the defendants were partners, and for what time, on a bill filed by one of them against the other, is admissible evidence to establish a partnership, the verdict having found them to be so.

A person who suffers his name to be used in a firm^c, although he thereby makes himself a partner to the world, yet if in fact he is not so, nor has any share in the profits, may be a witness in an action brought by the other parties in the firm, for goods sold and delivered.

When a partnership is dissolved^d, it is not dissolved with regard to things past, but only with regard to things future.

^a Colson & al. v. Selby, 1 Esp. N. P. C. 452. ^c Parsons v. Crosley, 5 Esp. N. P. C. 199. Ld. Ellenborough C. J.

^a Porthouse v. Parker, 1 Camp. N. P. C. 82. ^d Wood v. Braddick, 1 Taunton's R. 104.

^b Whately v. Menheim & aur., 2 Esp. N. P. C. 608.

(3) See Alderson v. Pope, 1 Camp. N. P. C. 404. n. where it was holden by Ld. Ellenborough C. J. that notice to one member of a firm, was notice to the whole partnership.

Hence an admission made by one of two partners after the dissolution of the partnership concerning joint contracts, that took place *during* the partnership, is competent evidence to charge the other partner.

If one of several partners promise individually to pay a debt, without making any mention of his partners, such promise is conclusive evidence that the debt was due from him individually, and not from the partnership, and he will not be permitted to shew that it was due jointly from himself and his partners*.

* Murray v. Somerville, 2 Camp. N. P. C. 99 n.

CHAP. XXXII.

QUO WARRANTO.

- I. *Of the Origin and Nature of Quo Warranto Informations, and Statutes relating thereto, viz. Stat. 4 and 5 W. & M. c. 18. and 9 Ann. c. 20.—Proceedings against the City of London in the Time of Charles the 2nd.*
 - II. *In what Cases the Court will grant an Information in nature of Quo Warranto.—Of the Stat. 13 Car. 2. Stat. 2. c. 1.—5 Geo. 1. c. 6.*
 - III. *Of the Limitation of Time for granting an Information.*
 - IV. *Of the Construction of Charters, and of the Operation and Effect of a new Charter.*
 - V. *By-laws.*
 - VI. *Of the Inspection of the Records of the Corporation.*
 - VII. *Of the Pleadings.*
 - VIII. *Evidence.*
 - IX. *Judgment.*
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- I. *Of the Origin and Nature of Quo Warranto Informations, and Statutes relating thereto, viz. Stat. 4 and 5 W. & M. c. 18. and 9 Ann. c. 20.—Proceedings against the City of London in the Time of Charles the 2nd.*

THE ancient writ of quo warranto (1), whence the infor-

(1) See the form in Rastal's Entr. 540. b. ed. 1670, where the writ appears to have been prosecuted by the king's attorney-general before the justices in Eyre, who were empowered by stat. 18.

mation of the present day derives its origin, was in the nature of a writ of right for the king, against persons who claimed or usurped any office, franchise, liberty, or privilege belonging to the crown, to inquire by what authority they maintained their claim, in order to have the right determined. The judgment on this writ was, that the franchise *capiatur in manum domini regis* (2). This writ having fallen into disuse, on account of the delay with which it was attended, a more expeditious mode of proceeding has been adopted, viz. an information filed by the king's attorney general, in nature of a quo warranto, in which the person usurping is considered as an offender, and consequently punishable by fine. The court, however, will not extend this remedy beyond the limits prescribed to the old writ; and, as that could only be prosecuted for an usurpation on the rights or prerogatives of the crown, so an information in nature of quo warranto can only be granted in such cases*; and upon this principle the court refused to grant an information to try the validity of an election to the office of church-warden.

By stat. 4 and 5 W. & M. c. 18. it is enacted "that the clerk of the crown office shall not, without express order of the court, receive or file any information for trespass, or other misdemeanor, or issue any process thereon, before he shall have taken, &c. a recognizance from the prosecutor to the defendant, in the penalty of 20*l.* to prosecute with effect; and in case the defendant shall appear and plead to issue, and the prosecutor shall not, at his own costs, within one year after issue joined, procure the same to be tried^b, or in case the defendant shall have a verdict, or a *noli prosecute* be entered by the informer, the court may award the defendant costs, &c. unless the judge shall, at the trial, certify that there was a reasonable cause for exhibiting the information, and if the informer does not pay the costs taxed within three months after demand, the defendant shall have the benefit of the recognizance to compel him." Although the words of this statute relate only to informations for trespasses, batteries, and other misdemeanors, yet it has been holden to extend to informations in nature of quo warranto, to try the right of usurping on public franchises; consequently, such informations cannot be filed without

a *R. v. Shepherd*, 4 T. R. 381. R. v. b *R. v. Howell*, Ca. Temp. H. 247.
Dawbeny, Str. 1196. S. P.

Ed. 1. stat. 2. s. 2. (A. D. 1290.) to determine pleas of quo warranto. See 2 Inst. 497.

(2) See Rast. 540. b.

leave^c, nor can process be issued thereon without a recognizance^d, and the defendant is entitled to costs in the cases provided for by the statute, as far as the recognizance extends, that is, to 20*l.* but not farther^e (3).

The usurpation of offices and franchises in corporations constitutes the principal ground for applications to the court for this kind of information. By the common law, such usurpations could be punished only by a prosecution at the king's suit, though the dispute were really between party and party (4). To remedy this inconvenience, it was enacted, by stat. 9 Ann. c. 20. s. 4. that, "in case any person shall usurp, intrude into, or unlawfully hold, and execute any of the said offices or franchises (5), the proper officer of the court (6) may, with leave of the respective courts, exhibit informations in the nature of quo warranto, at the relation of any person desiring to prosecute the same (and who shall be mentioned in the information to be the relator,) against the person usurping, and proceed therein as is usual in informations in the nature of a quo warranto, and if it shall appear to the courts, that the several rights of divers persons may properly be determined on one information, the courts may give leave to exhibit one information against several persons; the parties prosecuted are to plead the same term or sessions in which the information is filed, unless farther time be allowed by the court, and the prosecutors are to proceed with the most convenient speed.

By the 5th section, the courts are authorized to give judgment of ouster against, and to fine the parties, if found guilty of the usurpation, and to award costs to the relator, but if judgment be given for the defendants, then the court may award costs against the relator.

- c Per *Ld. Hardwicke, C. J. R. v. Howell, C. T. H. 248.* e *R. v. Howell, C. T. H. 249. S. C. ut videtur, under the name of R. v. Morgan, Str. 1042. R. v. Filewood, 2 T. R. 145. R. v. Brooke, 2 T. R. 197.*
d *R. v. Mayor of Hertford, Carth. 503. Salk. 376.*

(3) The ground of the decision appears to have been that such usurpations are misdemeanors. See *C. T. H. 248.*

(4) In informations at common law, there is no relator.

(5) *i. e.* the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and *places* (that is, places of the same kind with those before enumerated, see 5 *T. R. 379.*) in England and Wales, and the franchises of being burgesses or freemen. See the preamble. "All corporations consist of officers and freemen. This statute was meant to extend to both." Per *Ld. Mansfield C. J. in R. v. Williams, 1 Bl. R. 95.*

(6) Court of King's Bench, courts of sessions of counties palatine, or courts of grand sessions in Wales.

Before the statute of Queen Ann a private person could not interpose in *quo warranto*; the crown only, by the attorney-general, could file such informations; but, although this statute gives liberty to file such informations at the relation of a particular person, who is made liable to costs if there be judgment for the defendant, yet they must be filed with leave of the court^f.

It was observed by Wilmot J. in *R. v. Trelawney*, 3 Burr. 1616, that the two acts of parliament (of 4 and 5 W. and M. c. 18. and 9 Ann. c. 20.) relate to quite different objects, and are the reverse of each other. The former *restrains* the clerk of the crown in the court of King's Bench from exhibiting or filing informations *without leave* of the court, in cases where all the king's subjects might, before the making of that act, have made use of the king's name *without such leave*. The latter *lets in every person* who desires it, to make use of his name in prosecuting usurpers of franchises; whereas, before, *no subject* could have done so; but it provides, that *these* informations (as well as those for misdemeanors) must be under the leave and discretion of the court; and the court ought not to give such leave without sufficient reason.

The stat. 9 Ann. c. 20. only regulates the proceedings on informations against individuals^g usurping offices or franchises in corporations; it does not extend to a private company^h; and, consequently, in other cases where the information at common law is exhibited, advantage cannot be taken of the foregoing provisions. In the information at common law there is not any relator; but this addition may be rejected as surplusageⁱ. Doubts appear to have been entertained, whether in the common-law information a judgment of ouster could be given. In *R. v. Mayor of Hertford*, Ld. Raym. 426. Holt C. J. speaks of this as the proper form of judgment. In *R. v. Bennett*^k, Trin. 4 Geo. 1. the judges were equally divided on the question; but in *R. v. Ponsonby*, M. 29 G. 2. Say. R. 245. it was solemnly determined, that, unless the case of the person found guilty be within the statute, judgment of ouster ought not to be given^l. It has also been expressly decided, that, unless the case be within the statute, judgment for costs^m ought not to be given.

^f Per Ld. Mansfield C. J. in *R. v. Trelawney*, H. 5 Geo. 3. MS.
^g *R. v. Corporation of Carmarthen*, 2 Burr. 369.
^h *Horn v. Cutlers' comp.*, B. R. E. 9 G. 2. MS.

ⁱ Per Denison J. 1 Burr. 408.
^k Cited in Say. R. 247.
^l See, however, 1 Burr. 402.
^m *R. v. Williams*, B. R. M. 31 G. 2. 1 Burr. 402. 1 Bl. R. 93. S. C. R. v. Wallis, 5 T. R. 375.

The preceding remarks will be found material, inasmuch as there are many cases not mentioned in the statute, in which informations in nature of *quo warranto* will lie; *e. g.* it will lie against a private person or against a corporation, for holding a market, a court leet or other court, or for exercising any other franchise; that is, the king's attorney general may exhibit informations for the usurpation of these franchises upon the crown; but, whether informations for such usurpations can be granted upon the application of a private person, is a question, which has not hitherto received a solemn determination. The point underwent considerable discussion in the case of *R. v. Marsden*, 3 Burr. 1812. 1 Bl. R. 579. Yates J. thought, that as every usurpation of a franchise was a misdemeanor, a private person might apply as for the misdemeanor; but he, together with the other judges, declined giving any fixed opinion; in the case then before the court, it was not sufficiently shewn, that there had been an usurpation, the court therefore refused to grant the information on that ground.

By the suggestion of evil counsellors, and in order to increase the power and influence of the crown, it was deemed expedient, in the latter end of King Charles the second's reign, to new-model the corporate cities and boroughs. Against many corporations (who declined surrendering their charters voluntarily,) informations, in nature of *quo warranto*, were filed, grounded upon the notion that such corporations had forfeited their franchises through neglect or by abuse of them. An information of this kind was filed against the corporation of the city of London. The charge against them was, that they had forfeited the liberty of being a corporation,—first, by making a by-law for the levying several sums of money of the king's subjects coming to the public markets within the city to sell their provisions. Secondly—by having in common council voted a petition to the king, stating, that by the prorogation of the parliament on the 10th Jan. 32 Car. 2. the prosecution of the public justice of the kingdom had received interruption, and by ordering the said petition to be printed, with intention that it should be dispersed among the king's subjects, to induce an opinion that the king, by proroguing the parliament, had obstructed the public justice, and to incite the king's subjects to a hatred of his person and government, and to disturb the peace of the kingdom. The case came before the court upon demurrer, which was joined in M. T. 34 Car. 2. at which time Pemberton was C. J. of the King's Bench; but before H. T. when it came to be argued,

Sir E. Saunders, who had been counsel for the crown in drawing and advising upon the pleadings, was appointed C. J. of the King's Bench in the room of Pemberton^a, who entertained doubts. It was argued twice, the first time in H. T. 35 Car. 2. 1682-3, by Finch, solicitor-general for the crown, and Sir G. Treby, recorder of London, for the corporation; the second time in E. T. 35 Car. 2. 1683, by Sir R. Sawyer, A. G. for the crown, and Pollexfen for the corporation. It was contended, on the part of the crown, that a corporation may be forfeited; that corporations have the same creation as other franchises, and subsist upon the same terms, that there is a trust annexed to all franchises, that they be not abused, and the breach of them is a forfeiture. It was then insisted, that any act of the mayor, aldermen, and common council, in common council assembled, was so much an act of the corporation as would make a forfeiture; and lastly it was urged, that the acts in question were such acts as, being done by the corporation, worked a forfeiture. Judgment was given in Trin. T. 35 Car. 2. that the liberty, privilege, and franchise of the mayor, commonalty, and citizens, being a body politic and corporate, should be seized into the king's hands, as forfeited. This was a great extension of the prerogative, but it was conceived, by the king's advisers, that the example of this proceeding against the metropolis might have an effect (as in fact it had) upon other corporations; and that the crown would be enabled, upon granting new charters, to name the magistrates. This violent exercise of the prerogative, as far as it respected the city of London, was strongly marked by stat. 2 W. & M. sess. 1. c. 8. which reversed the judgment, and declared that the mayor, commonalty, and citizens of the city of London, should for ever continue a body corporate and politic *in re, facto, et nomine*, without any seizure or forejudger of the said franchise, liberty, and privilege, or being thereof excluded or ousted, upon any pretence of any forfeiture or misdemeanor at any time theretofore, or thereafter to be done, committed, or suffered.

^a See Burnet's Hist. of his own Time, vol. 2. p. 925. ed. 12mo. 1795.

II. *In what Cases the Court will grant an Information in nature of Quo Warranto.*—Of the Stat. 13 Car. 2. Stat. 2. c. 1.—5 Geo. 1. c. 6.

HAVING thus endeavoured to explain the general nature of the quo warranto information, and having set forth the alterations made by the statute of Queen Ann, in cases relating to offices and franchises in corporations, I shall proceed to inquire, what the nature of the office must be for the usurpation of which the court will grant this information.

In the case of the *R. v. Boyles*, Str. 836. 2 Ld. Raym. 1559. it was holden, that it is not necessary to set forth in the information the whole constitution of the place; or to shew, whether the office is by charter or prescription. If it be alleged to be an office, which appears upon the face of the information to concern the public, this is sufficient against the person who usurps it. Hence, the court permitted an information to be exhibited against the defendant, who exercised the office of bailiff of a ville; because it appeared, that it was a public office, and concerned the government of the ville, and the administration of public justice. So, the court will grant an information in the nature of quo warranto against the portreeve of a borough and manor; who, as portreeve, is returning officer of the borough^o. So, against a person claiming to have a right of voting by virtue of a burgage tenement^p. So, against the bailiff of a borough and manor, who, being a prescriptive officer and member of the court leet, had power to summon and select the jury^q; for such discretionary power is a material and important function in the administration of justice (7). So, against the steward of a court leet^r. So, against the constable of a parish^s. There must be an user as well as a claim of a franchise, before the court can entertain an

^o *R. v. Mein*, 3 T. R. 596. Borough of Fowey. ^q *R. v. Bingham*, 2 East, 308. Borough of Gosport.
^p *Horsham case*, H. 30 G. 3. 3 T. R. 599. n. ^r *R. v. Hulston*, Str. 621.
^s *R. v. Goudge*, Str. 1213.

(7) It appeared in this case, that the bailiff was not entitled to any fees, so that an action for money had and received could not have been brought to try the defendant's title; a circumstance which seems to have influenced the decision of the court.

application for an information^t. As to what shall amount to an user, see *R. v. Tate*^u.

The court have established a general rule to guide them in exercising their discretionary power of permitting informations in nature of quo warranto to be filed, that they will not permit one corporator to object to the title of another, if he has concurred in the election of that other, or acknowledged his title by acting with him; or if the objection that he makes to the title of that other be equally applicable to his own, or to the title of those under whom he claims^v. Neither is it competent to a stranger to the corporation, although an inhabitant of the town, to impeach the title of a corporator^w, unless he can shew that as an inhabitant he is subject to the local jurisdiction of the body corporate.

By stat. 13 Car. 2. stat. 2. c. 1. the election of corporate officers, who have not taken the sacrament within one year next before their election, is declared to be void. Hence, an information in nature of quo warranto may be applied for on this ground; and the circumstance of the relators having concurred in the election which they thus seek to set aside, will not afford any objection to *this* application; because the defect is a latent one, arising from the omission of an act which the legislature has positively required to be done, before any person is elected into a corporate office^x. And a stranger to the corporation may apply for an information in this case; because the ground of the application is to enforce a general act of parliament, which interests all the corporations of the kingdom^y. But by statute 5 Geo. 1. c. 6. s. 3. the object of which was to lessen the rigour of the stat. of Charles, prosecutions in order to oust the party elected into a corporate office, on the ground of having omitted to take the sacrament, as required by the stat. of Charles II., must be commenced within six months after the election. It seems, that the prosecution is commenced by applying for the rule^z. Since this statute, the election of a person who has not taken the sacrament within a year next preceding his election, is not void, but only voidable, in case of a removal or prosecution within the limited time^a. Hence, where the plaintiff having been elected and sworn into the office of town clerk, brought a mandamus for the insignia

^t *R. v. Whitwell*, 5 T. R. 85.

^u 4 East, 337.

^x *R. v. Cudlipp*, 6 T. R. 503. Borough of Launceston.

^y *R. v. St. John*, E. T. 52 G. 3. MS. Borough of Weeton Bassett.

^z *R. v. Smith*, 3 T. R. 573.

^a *R. v. Brown*, 3 T. R. 574. n.

^b S. C.

^c Per *Ld. Mansfield C. J.* in *Crawford v. Powell*, 2 Burr. 1016.

and other things belonging to the office; to which the defendant returned, that the plaintiff was not duly elected. In an action for a false return, it was objected that the plaintiff ought to prove, that he had taken the sacrament within the time prescribed by the statute of Charles; but it was holden, that he was not obliged to prove this fact, inasmuch as there not having been any prosecution or removal within the time limited by the stat. of King George, the plaintiff's election stood confirmed, and became absolute^d. In this case, the plaintiff was in possession of the office; but where it appeared^e, that the plaintiff being out of possession brought a mandamus to swear him into his office, it was holden, 1st, that the case was not within the statute of George, because never having been admitted into the office, he could not be removed out of it, nor incur a forfeiture; and 2ndly, that it was incumbent on the plaintiff to prove, that he had received the sacrament within a year next before his election.

The corporation of Winchelsea consists of a mayor and jurats^f. Before a person can be elected mayor, he must be a jurat. Plaintiff was chosen a jurat, and continued so a year, not having taken the sacrament within a year previous to his election. He was then chosen mayor, having taken the sacrament within a year before this last election. The question was, whether the statute of George had so removed all incapacities in the plaintiff, as to qualify him to be mayor, he not appearing to have been questioned for not taking the sacrament before he became a jurat. It was holden, that the statute of George was a remedial law, and ought to be construed liberally; and consequently, that it removed the incapacity of the party, and that it would be a forced construction to confine the generality of the words to a discharge of prosecutions.

Votes given for a candidate, after notice of his being ineligible, are to be considered as thrown away, that is, as if the persons so voting had not voted at all^g. In such case, if there are other candidates, who are duly qualified, he who has the greatest number of legal votes will be duly elected.

By the test act^h every person who shall be admitted, &c. into any office civil or military, or shall receive any pay, &c. by reason of any patent or grant of his majesty, or shall be admitted into the family of his majesty, shall take the oaths of supremacy and allegiance the next term, and sub-

^d S. C.

^e *Tufton v. Nevinnson*, Ld. Raym. 1354. See also Cowp. 539.

^f *Martin v. Jenkins*, M. 14 G. 2. MS. Str. 1145. S. C.

^g *R. v. Hawkins*, 10 East, 211.

^h 25 Car. 2. c. 2. s. 3. A. D. 1672.

scribe the declaration against transubstantiation; and shall also receive the sacrament of the Lord's Supper, after the manner of the Church of England, within three months (8) after their admittance into the said office. Persons neglecting or refusing to take the oaths and sacrament, and being convicted of executing their offices after such neglect or refusal, are disabledⁱ from suing either at law, or in equity, from being a guardian, executor, or administrator; from being capable of any legacy, or deed of gift, or to bear any office; and shall forfeit 500*l*. Several attempts have been made to obtain a repeal of the corporation and test acts; but hitherto, they have been ineffectual. The inconveniences, however, arising from these statutes, have been greatly mitigated by the annual acts of parliament, which since the year 1743^k, have been constantly passed, for the indemnity of persons who have omitted to qualify themselves within the time limited, and for allowing further time for that purpose.

III. *Of the Limitation of Time for granting an Information.*

IN the year 1767, different motions having been made with a view to impeach the titles of corporators in the borough of Winchelsea, after a long quiet enjoyment, it was suggested from the bar, that it would be absolutely necessary to *draw a line* and to *fix the precise period* of possession after which a corporator ought not to be disturbed, by any information in the nature of a quo warranto, granted under the discretionary power given by 9 Ann. c. 20.; whereupon the court declared, that by analogy to several statutes and to the rule that had been laid down in several other cases (9),

i 25 Car. 2. c. 9. s. 5.

k See 16 Geo. 2. c. 30.

(8) Enlarged to six months, by stat. 16 Geo. 2. c. 30. s. 3.

(9) The statute of limitations (21 Jac. 1. c. 16. s. 1.) concerning writs of formedon and entry into lands, is confined to twenty years. The stat. of 10 and 11 W. 3. c. 14. s. 1. concerning writs of error is also confined to twenty years. Courts of equity do not allow the redemption of a mortgage after twenty years. Bills of review have been generally disallowed after twenty years. Bonds which have lain dormant, shall be supposed to be satisfied after twenty years. Ejectments require a proof of possession within 20 years.

a quiet and undisturbed possession of a franchise for *twenty years*, ought to be a bar to any application made to the Court of King's Bench, although it could not be a bar to the *king himself*, if he should think fit to prosecute the usurpation by his attorney-general; that twenty years was the *ne plus ultra*, beyond which the court would not disturb a peaceable possession of a franchise; but that in every case within twenty years, their granting the rule, or refusing to grant it, would depend upon the particular circumstances of the case that should be in question before them¹, that, within twenty years, length of time might weigh as *presumptive* evidence; or, as one *circumstance* joined to others, to shew the impropriety of granting an information². Hence, where the qualification was residence and paying scot and lot, and the fact of residence was doubtful, but there had been an acquiescence on the part of the persons applying, and a concurrence in the election of the corporator, and in many subsequent acts, the court discharged the application for a removal with costs³. So, where an information was prayed against a person who had served the office of mayor, the relator alleging, that he *believed* the defendant had not been duly sworn in; twelve years having elapsed without any interference, and it appearing by the corporation books, that the defendant had been sworn in, the court refused to grant the information⁴. At a subsequent period, viz. in Hil. Term, 1791, the court were of opinion, that the limitation of twenty years, within which time these applications might be granted, was much too long a period, and contrary to the intent of the 9 Ann. c. 20. That at the time when the rule was laid down in the *Winchelsea* cases, the court were certainly unapprized of several cases, which had been determined before that time; *R. v. Pike and Prideaux*, Tr. 10 Geo. 1. *Rex v. Johns*, there cited; and *Rex v. the mayor of Helleston*, Hil. 12 Geo. 1. 3 T. R. 311. which were decided entirely on the ground of length of time, though considerably within twenty years. The court, therefore, with a view to prevent corporations being thrown into confusion, resolved, and expressed their resolution in the form of a general rule⁵, that, in future, they would limit their own discretion in granting applications of this nature to six years; beyond which time, they would not *under any circumstances*, suffer a party who had been so long in possession of his franchise to be disturbed. And, in a subsequent case⁶, the court

¹ *Winchelsea* causes, 4 Burr. 1962.
See also *R. v. Stacey*, 1 T. R. 1. and
R. v. Newling, 3 T. R. 314.
² *R. v. Dawes*, 4 Burr. 2121.

³ *R. v. Edw. Wardroper*, M. 7 Geo. 3.
4 Burr. 1963.
⁴ *R. v. Newling*, 3 T. R. 310.
p 4 T. R. 284.
⁵ *R. v. Peacock*, 4 T. R. 684.

refused to grant a quo warranto information to impeach a derivative title, where the person claiming the original title, had been in the undisturbed possession of his office six years. An act of parliament has since been passed, grounded on the spirit of the above rule, (stat. 32 Geo. 3. c. 58.) by which it is enacted, 1st, that it shall be lawful for any defendant to plead to an information in the nature of a quo warranto, *that he held or executed the office or franchise six years or more, before the exhibiting of the information*; and that if the issue joined on such plea, be found for the defendant, he shall be entitled to judgment and costs. And 2dly, that titles derived under an election, nomination, swearing into office, or admission of any person, shall not be affected by reason of any defect in the title of the person electing, &c. in case such person has been in the exercise of his office six years before the time of filing the information.

IV. *Of the Construction of Charters, and of the Operation and Effect of a new Charter.*

CONTEMPORANEOUS usage has always been considered as of great importance in the construction of charters^r; not that usage can overturn the clear words of a charter, but if they are doubtful, the usage under the charter will tend to explain the meaning of them^s.

If a corporation by prescription accept a charter, whereby the election of burgesses is directed to be made in a manner different from what had obtained by antient usage, the usage being inconsistent with the charter, can no longer subsist; but is determined by the acceptance of the charter, which must afterwards be the only measure, by which the election of burgesses is to be governed^t.

If a corporation has franchises and privileges by grant or prescription, and afterwards they are incorporated by another name, as if they were "the bailiffs and burgesses" before, and afterwards they are to be stiled, "the mayor and com-

^r Per Ld. Keayon C. J. delivering opinion of court, *R. v. Bellringer*, 4 T. R. 821. ^t *Powell v. The King*, D. P. 3d Mar. 1728, 2 Bro. P. C. 298. Tomlin's ed. Borough of Brecknock.

^s Per Ld. Mansfield, C. J. in *R. v. Varlo*, Cowp. 250.

monalty;" yet the newly-named body shall enjoy all the franchises, privileges, and hereditaments, which the old corporation had either by grant or prescription^a.

Where the king grants a charter to a corporation, there being a prior charter existing at the time, the new charter is void *ab initio*; because two corporations for the same purposes of government, cannot exist within one and the same place, and at one and the same time^x.

While a corporation exists capable of discharging its functions, the crown cannot obtrude another charter upon them^y. It is competent to them, either to accept or reject the proffered charter.

If there be an old charter surrendered, but the surrender is not, inrolled, and a new charter, in consideration of the surrender, granted, the second charter is void^z; and if there be any other persons named in the new charter who were not in the old, any law made by them is void; because they act under a void charter; but otherwise if the members nominated are the same as in the old charter, because then they act by their first charter, which still remains good^a. Upon a quo warranto against the town of Liskeard, in the reign of Charles the Second, they surrendered their charter, which was not inrolled until the reign of king James the Second, who, in consideration of the surrender, granted a new charter to them. It was holden, that the second charter being in consideration of a void surrender, was also void^b.

An information, in nature of a quo warranto, was brought against defendant^c, stating that king Henry the Fourth, by charter granted to the corporation of the city of Norwich, that the city should be a county by itself, and that the *commonalty* should choose *two* sheriffs;—that king Charles the Second confirmed the charter of Henry the Fourth, and granted over, that the mayor, sheriffs, and aldermen should choose one person to execute the office of sheriff, and that the commonalty should choose another;—that the defendant had been elected sheriff by the mayor, sheriffs, and aldermen; but had refused to take upon him the office. The defendant pleaded, that he was a protestant dissenter, and had not taken the sacrament within a year before his election.

^u 4 Rep. 77. ^b per Cur. Haddock's case, 1 Vent. 355.

^x R. v. Amery, D. P. 20th April, 1790, 2 Bro. P. C. 336. Tomlin's ed.

^y Ld. Kenyon C. J. R. v. Pasmare, 3 T. R. 240.

^z R. v. Osborne, 4 East, 335.

^a Bully v. Palmer, 12 Mod. 247. Salk. 190. S. C.

^b Piper v. Dennis, 12 Mod. 253.

^c R. v. Larwood, Ld. Raym. 29. Salk. 167. Comb. 315. S. C.

(10) It was contended, on the part of the defendant, that the election was void; that the mayor, sheriffs, and aldermen, had no power to make such election, inasmuch as the liberties granted by the charter of Henry 4. could not be divested but by surrender or forfeiture, and neither the one nor the other appeared by the record; nor was it apparent, that the corporation had accepted the new charter. But Holt C. J. and Sir Giles Eyre, were of opinion, that the defendant was duly elected; for, although the new charter had been void, if the corporation had refused to accept it, since the king could not take away liberties before granted by him, without the concurrence of the grantees, yet, if the corporation accepted such a charter, it was good;—that here was evidence of their acceptance; for the commonalty used heretofore to elect both the sheriffs, and now they elected only one; and the election of the other, by the mayor, &c. shewed, *primâ facie*, that they accepted it. Besides, if the corporation had not accepted the new charter, the defendant ought to have shewn it; but here he had admitted it by his special plea. That the corporation might have used the new charter as a grant or confirmation; but having made their elections according to it, it was evidence of their consent to accept it as a grant.

Where an application is made to the court for a mandamus, to direct the filling up any vacancies in a definite integral part of a corporation, the court will require strong grounds to induce them to refuse the writ, on account of the great inconvenience which may follow from the not filling up such vacancies, and the risk of dissolving the corporation^d.

When a corporation is reduced to such a state as to be incapable of continuing its existence and of doing any corporate act, it is extinct as a body corporate. In such case, it is competent to the crown to renovate it, by granting a new charter to the remaining members of the old corporation, in conjunction with others, or to others alone^e. It is not necessary that this charter should be accepted by a majority of the remaining members of the old corporation; it is sufficient if it be accepted by a majority of the grantees.

d R. v. Mayor of Grampond, 6 T. R. 301.

e R. v. Pasmore, 3 T. R. 199.

(10) There were other pleadings; but as the points arising out of them are foreign to the subject of this chapter, they are omitted.

Where a charter is silent as to the mode of continuing the succession, a corporation has a right of *necessity*, or an incidental power to continue itself, and to make reasonable by-laws for that purpose; as by election. Where, however, there is a provision of such a nature as is calculated *at all times* to continue the succession, without ever proceeding by way of voluntary election, that may afford a ground for presuming that voluntary elections were meant to be excluded; but where there is no provision, affording a supply of burgesses *to that extent*, the corporation has the right of proceeding by election. Hence a provision for a supply of burgesses by the sources of birth and servitude, has been holden to be not incompatible with the existence of a power of election; for, though these modes of supply may render a frequent recurrence to election less necessary, the supplies from all these sources are not likely so to overload the corporation, as to incumber its operations by a destructive or very inconvenient redundancy of its members; and without occasional supplies by election, the other sources, by birth and servitude, might be insufficient^f.

V. By-Laws.

EVERY corporation has power to make by-laws. This power, like the power of suing, or the capacity of being sued, is included in the very act of incorporation; and it is not necessary, although usual, for the crown to confer this power in express terms^g. Where the corporation is by charter, such by-laws may be made as will enforce the end of the charter in a way more convenient, and tending more to the care and good government of the society, than what the charter has prescribed. Hence, where it is directed by the charter, that the mayor, or aldermen, or other principal officers, shall be chosen by the burgesses or commonalty at large, the corporation may, by *common assent*, for the purpose of avoiding popular confusion, make a by-law, restraining the power of election to a select number of burgesses or commonalty^h; that is, where the right of election is given to a whole class of men, they may restrain it to a part of themselves; but where a corporation consists of several integral

^f R. v. Bird, B. R. H. 51 G. 3. 13 East, 367.
^g Hob. 211.

^h Case of Corporations, 4 Rep. 77. b.
 See also Barber v. Boulton, 1 Str.
 314. R. v. Bird, 13 East, 375.

parts, as, 1st, the mayor; 2dly, the aldermen; 3dly, the commonalty; and the right of election is given to the three parts conjointly, a by-law excluding one integral part from the right of election, e. g. the commonalty, is void¹.

In order to give validity to corporate acts, it is essentially necessary, in all cases where by the constitution of the corporation there is a definite body, who form an integral part of the corporation; 1st, that a majority of that definite body should exist² at the time when any corporate act is to be done. Hence, if an integral part of a corporation is reduced by the death of its members, so that there does not any longer remain a majority of such integral part, there is an end of the corporation¹. 2dly, That a majority of that body must attend the assembly, where such act is to be done. It is not, however, necessary, when met, that there should be a majority of each of the integral parts, to give validity to the corporate act; it is sufficient if it be done by a majority of the whole, when so properly assembled³. "If corporate acts are to be done by a select number of members upon a particular day, all who have a right to be present in that assembly ought to be summoned, and to have notice that they are to meet on the business (it is not necessary to specify what business) of the corporation. This rule admits of no exception, unless in the case where a member has absolutely deserted the town, by absenting himself and removing his family out of the town. It must be an entire departure from the place; for if the person has an house and family in a corporate town, though he be abroad at the time of holding the assembly, whether for his health, his diversion, or upon business, he ought to be summoned. When the notice is regularly given, a majority have power to do any corporate act—but if the whole assembly meet by accident, they may proceed on business, provided they are unanimous; but otherwise it is, if any one member of the corporation dissents, he has an absolute negative⁴."

It is essential to the validity of a by-law, that it should be consistent with, and that it should not be repugnant to, or contradict the charter; for in a case where the charter directed that the mayor and aldermen, or the major part of them, should yearly nominate four of the burgesses, or inhabitants, to the commonalty at large, out of whom they were

i R. v. Head, 4 Burr. 2515. Borough of Helston.
k R. v. Morris, 4 East, 17.
l Ld. Kenyon C. J. R. v. Grampond, 6 T. R. 302.

m R. v. Bellringer, 4 T. R. 810. R. v. Miller, 6 T. R. 268.
n Per Ld. Hardwicke, C. J. in R. v. Kynaston, B. R. T. 3 & 9 G. 2. MS.

to elect one to be mayor, and who, at the end of his year, was to be an alderman; it was holden, that a by-law providing, that an *alderman*, who was an inhabitant, might be elected mayor, was bad, inasmuch as it was inconsistent with the charter; because it was not intended, that aldermen who were to nominate the candidates for the mayoralty, and who were to commence aldermen by serving the office of mayor, should be chosen mayors, because they happened to be inhabitants^o.

A by-law though made by the whole body, if it narrow the number of those out of whom the election is to be made, is void. Hence, where the power of electing the mayor was given, by the charter, to the mayor, burgesses, and commonalty, who were to choose the mayor *out of the burgesses*, and a by-law directed, that the mayor and common-council, (11) or the major part of them, of which the mayor to be one, should elect *one of the common council* to be mayor; it was holden, that such by law was bad; because it is competent to a corporation to make such ordinances only as are for the better government of the corporation; and the present by-law was prejudicial, inasmuch as it confined their choice; for on the terms of the charter, they were at liberty to choose out of the burgesses at large. And Lee C. J. observed, that *a corporation could not alter the charter as to the persons eligible*, neither could they set up another government than the charter had prescribed^o. And upon the same principle, a by-law directing that no person shall be elected mayor a second time within six years, has been holden to be void^q.

A by-law made by a part of the corporation to deprive the rest of the right of electing, without their assent, is bad. Hence, where by the charter the power of electing common-councilmen was given to the mayor, jurats, and commonalty,

o R. v. Tucker, E. 14 G. 2. MS. Borough of Weymouth.

p R. v. Phillips, Mayor of Carmarthen, H. 22 G. 2. Trin. 22 & 23 G. 2. MS. and Bull. N. P. 211. S. C.

q cited in 2 Burr. 1336, 1338, 1339. (12).

R. v. Mayor of Cambridge, H. 23 G. 3. MS.

(11) N. The charter contained a provision, that the corporation might elect out of the burgesses twenty to be common-council. MS.

(12) " This case was argued several times, and settled the point, that the number of the *eligible* cannot be narrowed, although, on the authority of the case in 4 Rep. 78. the number of *electors* may." Per Buller J. in R. v. Mayor of Cambridge, *ub. sup.*

and a by-law was made by the *mayor, jurats, and common-council*, restraining the election of common-councilmen to the mayor, jurats, such of the commonalty as were of the common council, and sixty others, who were senior common freemen; the by-law was holden to be bad^r.

A by-law cannot explain a doubtful charter: if there be any ambiguity on the face of the charter, it is the province of the court to expound it^s.

A by-law which gives a voice in the election to any person to whom it was not given by the constitution of the borough, is bad^t.

It remains only to observe, that a by-law may be good in part, and bad in part, provided the two parts are entire and distinct from each other^u.

Although there do not remain any traces of a by-law in the corporation-books, and although there cannot be any proof given of the loss of it, yet, upon evidence of constant usage, a jury may be directed to presume its existence^x. See *R. v. Head*, 4 Burr. 2518., and *R. v. Bird*, 13 East, 368, where defendants pleaded a by-law not now extant in writing. Sixty years usage has been considered as evidence of a by-law^y.

VI. *Of the Inspection of the Records of the Corporation.*

EVERY member of the corporation has, as such, the right to inspect the books belonging to the corporation, for any

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| <p>^r <i>R. v. Cutbush</i>, common-councilman of Maidstone, E. T. 8 Geo. 3. 4 Burr. 2204. (13).</p> <p>^s <i>R. v. Tucker</i>, E. 14 Geo. 2. B. R. MS.</p> <p>^t <i>R. v. Bird</i>, 13 East, 387.</p> <p>^u <i>Adm. per Ld. Kenyon C. J. in R. v. Fishermen of Faversham</i>, 8 T. R. 356.</p> | <p>^x See 2 Vez. 330.</p> <p>^y <i>Per Ld. Mansfield, C. J. in Perkins v. Master, Warden, &c. of the Company of Cutlers, in Hallamshire in the county of York</i>, 21 MS. Serjeant Hill, p. 65.</p> |
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(13) See also *R. v. Spencer*, 3 Burr. 1827. (the same corporation,) where a by-law excluding all the commonalty, except such as had served the office of church-warden and overseer, for one year, was holden void; inasmuch as it superadded a qualification not required by the charter, and which had no relation to, or connexion with, their corporate character or capacity.

matter that concerns himself, although the corporation are not parties to the dispute which renders the inspection necessary; but the court will not grant the rule generally, but only to inspect the particular book in which the information sought for is to be found^a.

VII. *Of the Pleadings.*

A *QUO WARRANTO* being in the nature of a writ of right, the defendant cannot plead any plea, except to justify or disclaim^a. Hence he cannot plead, not guilty^b. In like manner, he cannot plead, *non usurpavit*^c, or that he did not usurp the office in question. This appears from the nature of the charge, which calls on the defendant to shew by what authority he exercises the office in question, to which charge the pleas of not guilty and *non usurpavit* do not afford an answer.

By stat. 32 Geo. 3. c. 58. s. 1. "the defendants to any information in the nature of a *quo warranto*, for the exercise of any office, or franchise, in any city, borough, or town corporate, whether exhibited with leave of the court, or by his majesty's attorney-general, or other officer of the crown on behalf of his majesty, and each and every of them, severally and respectively, may plead, that he or they had first actually taken upon themselves, or held or executed the office or franchise, which is the subject of such information, six years or more before the exhibiting of such information, such six years to be computed from the day on which such defendant was actually admitted and sworn into such office or franchise; which plea may be pleaded either singly, or together with such plea as they might have lawfully pleaded before the passing of this act, or such several pleas as the court, on motion, shall allow; and if, upon the trial of such information, the issue joined upon the plea aforesaid, shall be found for the defendants, or any of them, he or they shall be entitled to judgment, and to such costs as they would by law have been entitled to, if a verdict and judgment had been given for them upon the merits of their title.

The second section provides, that the prosecutor may reply a forfeiture, surrender, or avoidance, by the defendant,

^a *R. v. Hostmen*, in N. upon T. Str. 1223.

^a Per Holt C. J. 12 Mod. 225.

^b Per Holt C. J. 12 Mod. 225.

^c *Queen v. Blagden*, 10 Mod. 226.

of the office, or franchise happening within six years before the exhibition of the information, whereon the defendant may take issue, and shall be entitled to costs in manner aforesaid.

The preceding statute having been made in *pari materia* with stat. 9 Ann. c. 20. is confined to corporate offices^d. But the defendant is entitled, by this act, to plead several pleas, although the limitation of time does not form the subject of one of his pleas^e.

Where the plea consists of several facts, from which the defendant infers that he is entitled to the office, the replication may contain a denial of any of the facts stated in the plea; but if it contain merely a denial of the inference drawn by the defendant from those facts, it will be bad; for that amounts merely to a denial of the law; for the judges are to determine, whether the inference drawn by the defendant is fairly drawn.

In an information against the defendant for usurping the office of portreeve, defendant shewed a title, and concluded his plea, "and so he says that he did not usurp in manner and form as in the said information is alleged;"—the coroner replied, that he did usurp in manner and form, &c. The replication was adjudged to be bad^f.

VIII. Evidence.

CORPORATION books are generally allowed to be given in evidence; when they have been publicly kept as such, and the entries made by the proper officer^g; not but that entries made by other persons may be good, as, if the town-clerk be sick, or refuse to attend; but then the circumstances under which the entries have been made, must be proved. Corporation books being of a public nature, examined copies of the entries therein may also be given in evidence; and consequently the court will not enforce the production of the original books^h, unless it appear to be necessary that they should be inspected on account of a rasure, new entry, or the like, which must be verified by affidavit.

d R. v. Richardson, 9 East, 469.

e R. v. Autridge, 8 T. R. 467.

f R. v. Portreeve of Honiton, in Devonshire, E. 1 Geo. MS.

g Per Cur. R. v. Mothersell, 1 Str. 93.

h Brocas v. Mayor, &c. of London, 1 Str. 307.

In a case¹, where it was insisted, that by the constitution of a corporation by prescription, no person was capable of being elected a common-councilman, who did not inhabit within the borough, and also hold a burgage tenure; to prove that such was the constitution, a witness was called, who was an inhabitant of the borough, but had no burgage tenure. The court were of opinion, that he was a good witness, observing, that there was a necessity of allowing such people in a question of this nature, since they must best know the right; besides, he was in effect a witness against himself, by saying, "though I am an inhabitant, yet I have no right to be chosen, because I have not a burgage tenure."

A person having a bare authority, and not being a party to the record, is not prevented from being a witness.

The custom of a corporation, in the election of a mayor, was^k, that at a court-leet, held within the town, the old mayor nominated one elisor, and the town-clerk another; and in case the town-clerk refused to do it, or was absent, then the mayor chose both the elisors, which elisors, so chosen, nominated the jurors, who were to elect the mayor for the subsequent year. An information in the nature of a quo warranto was brought against the defendant, to shew by what authority he claimed to be mayor of Tintagel. And there was likewise an information granted against one James Hoskins, for exercising the office of an elisor; and a third information against one Pascho Hoskins, for executing the powers of juror in that corporation. These informations were carried down to Cornwall, to be tried there before Baron Thompson. And when the information against the mayor came to be tried, his right depending upon the validity of this custom, upon which one of the issues was joined, he called James and Pascho Hoskins, to prove the custom of this borough to be as set forth above. But the counsel for the king objected to the competency of their testimonies; because they were called to support a custom, which they were concerned in interest to maintain; for if there was no such custom, then James Hoskins, who was chosen an elisor by the late mayor, in the absence of the town-clerk, was wrongfully chosen; and so likewise must Pascho Hoskins be, being nominated a juror by James Hoskins. And Thompson B. thinking this was a sufficient objection to their competency, refused to admit their testimony, whereupon a

¹ *Stevenson v. Nevinston*, Str. 583. *Ld.* ^k *R. v. Gray, Mayor of Tintagel*, B. R. Hil. 10 Geo. 2. MS. S. C. by the name of *R. v. Bray*, C. T. H. 358.

verdict was found for the king. A new trial was afterwards moved for, on the ground that the witnesses were competent and ought to have been received. The case having been very fully argued, Lord Hardwicke C. J. observed, that it would be proper to consider the objections against James and Pascho Hoskins separately, the strongest of which lay against James, the elisor.—“ The objections against James are principally two: 1st, that he is interested in the proof of this custom, because he has derived his right, and executed his authority, under that custom which he was called to prove. 2dly, that he is interested if there is no such custom; for then the former mayor had not any authority to choose him as an elisor, and consequently he will be liable to be punished in an information in quo warranto, for exercising such a power. As to the 1st objection, that James derives his own authority from this custom, I think the proper answer to it is, that his authority is ended; and his claim is not that of an office or franchise, but only a naked authority. For he is only an elisor chosen by the corporation, for the purpose of returning a jury to choose a mayor; and that is not an office, but an authority constituted for that particular purpose. And I am not aware of any case, where a person having a bare authority only, and not being a party to the record, as James was not, was ever hindered from being a witness: as in the case of sheriffs and their officers, who are always allowed to be witnesses to prove the execution of the process, and what was done under it, if they are not parties to the record. And therefore I think James had no interest in this office. As to the 2d objection, of his being liable to be punished by an information, for a wrong exercise of his power, I think it is by much the most material one. But it goes to his credit, and not to his competency, as I think; for I don't know of any case where ever it has been held, that a man was an incompetent witness, because he was possibly liable to be punished in an information in nature of quo warranto, for a past act, the lawfulness of which he may probably support by the testimony he is about to give in another action, to which he is not a party. And it is every day's experience, that persons who have formerly executed offices in a corporation, are produced to prove what they did when they were in the office, and what has been usually done in their time; though, in all such cases these officers have been liable to be punished by informations for their unlawful acts, the statute of limitations not extending to informations in quo warranto. And yet such witnesses have been always allowed as the best evidence. And should we determine that no person is a competent witness in matters

belonging to corporations, who is by possibility liable to be punished by information, we should shut out a great deal of good evidence. Wherever any unlawful act is done in a corporate assembly, the whole assembly is liable to be punished by informations; and yet the persons who were present at such assemblies are always allowed to be good witnesses; and if they were not allowed, there would be no evidence as to such acts at all. The case in 2 Ro. Ab. fo. 685. pl. 3. which says, if three several men, upon a suit in chancery, depose that J. S. made such an arbitration, &c., and upon that the party grieved brings three several actions against them for perjury, each of them shall be a competent witness for the other in the several actions, is full as strong as this, which case is mentioned in 2 Hale's History of the Pleas of the Crown, 280. And in 3 Keb. 90. a person interested was allowed to be a witness. Therefore, upon these reasons, without looking into, and comparing all the cases which have been cited at the bar, so as to distinguish one from another, (which, if I had done, it would have been difficult to have reconciled them together,) I think the objection to James Hoskins goes only to his credit, and not to his competency. And the objection to Pascho Hoskins is weaker than that to James. Whenever a question arises about the competency or credit of a witness, I am always inclinable, unless the objection is very strong, to allow it only to his credit; because, if the objection is allowed to his competency, it tends to shut out that light which an allowance only to his credit admits; and after the examination of the witness, the judge who tries the cause may make such observations to the jury upon the evidence of the witness as he shall think proper to take off the weight of the evidence." The other judges concurred, and a new trial was granted.

A judgment of ouster may be given in evidence to prove the ouster of a third person, by whom the defendant was admitted. In a quo warranto to try defendant's right to be a bailiff of Scarborough¹; in setting out his right, he shewed his own election under Batty and Armstrong, two former bailiffs, alleging, that at the time of his election they were bailiffs. Among many other issues the coroner took this, that Batty and Armstrong were not bailiffs, as alleged in the plea. The proof of this issue lying upon the defendant, he gave general evidence of the election and right of Batty and Armstrong. And to encounter that, the prosecutor gave evidence of the custom of the borough of electing bailiffs, and produced a record whereby judgment of ouster was

¹ R. v. Holden, E. 12 Geo. 2. MSS.

given against Batty and Armstrong, to remove them from the office, as not being duly elected to it. And it being objected on the trial, that this record ought not to be read against the defendant, and the judge having allowed it to be read, and left the whole evidence on both sides to the jury, to consider whether these persons were bailiffs or not, and the issue being found for the king, defendant moved for a new trial; 1st, because this record was *res inter alios acta*, to which the defendant was neither party or privy, and so *illi nocere non debuit*; although the judgment should have been obtained by default, misleading, ignorance of their case, or even by collusion, as the defendant was a stranger to it, he by law could not be let in to prevent any of those inconveniences, and therefore it ought not to have been admitted as any evidence against him, but, in the trial of his right, should have been totally rejected. 2dly, that the instances where records between other parties have been read, are, in cases of general customs, as in the city of London v. Clerk, Carth. 181. where, in a demand of toll, verdicts against other persons were read against the defendant, and were undoubtedly good evidence, amounting to no more than payment of the toll by strangers, which is always allowed as evidence to prove a custom. But, in this instance, the record was read to a single fact, viz. the election, which the law does not allow. Lock v. Norborn, 8 Mod. 141. where it is expressly laid down, that none can be bound by a verdict against another that is not party or privy to it, as the heir of the ancestor, or the like. 3dly, that this record, as read, must necessarily be conclusive evidence, and could not by law be left to the jury, as a matter that they could find against. Records are of so high a nature, that there can be no averment, much less parol proof admitted against them: and, therefore, to say that the whole evidence was left to the jury, was impossible; and the rather, because the credit of a record ought not, in any case, to be submitted to them.

On the other side were cited trials per pais, 906. Skin. 15. Brounker v. Sir Robert Atkins, where a nonsuit against a predecessor in the same office was read against a successor, because he came in privy, as an heir under an ancestor. So Rumball v. Norton, upon a traverse to the return of a mandamus, to swear plaintiff a burgess of Calne, on *non fuit electus*, a judgment of ouster against one of the plaintiff's electors was given in evidence against the plaintiff. So Mich. 13 G. 1. the King v. Bulcock, on a trial of a quo warranto to try defendant's right to be a mayor of Southampton, a judgment of ouster against his predecessor was read against him. Besides, it was objected that several other material

issues were found against the defendant; and, therefore, though this evidence ought not to have been given, yet the party ought not to have a new trial.

Per Cur. This evidence seems to have been rightly admitted. The defendant has made the title of Batty and Armstrong part of his right; and if he gives evidence of the right of their election, can that be better disproved than by a judgment of ouster, wherein such election is declared to be void? Indeed this evidence was not of itself conclusive, but might have been repelled by proving fraud, neglect, or any other circumstance which would have abated the weight of the judgment. And if any thing of that kind had appeared, the force of it, as to the defendant, would have been greatly lessened. But what makes this case still plainer is, that defendant, by his plea, makes title under, and takes upon himself to justify, their election; and therefore ought to be bound by what has been transacted by them. And if this evidence had been erroneously admitted, yet here are many more issues found against him, to which no objection is made; and being any of them sufficient to entitle the crown to a judgment of ouster against defendant, there is no colour to grant a new trial on this point. And for these reasons it was denied.

But although a judgment of ouster against one corporator, is admissible against another, deriving title through him, it is not conclusive^m.

IX. Judgment.

By stat. 9 Ann. c. 20. s. 5. it is enacted and *declared*, "that in case any person, against whom any information, in the nature of a quo warranto, shall be exhibited in any of the said courts (14), shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall be lawful for the said courts respectively, as well to give judgment of *ouster* against such person from any of the said offices or franchises, as to fine such person for his usurping, &c. any of the said offices or franchises; and the said courts, respectively, may give judgment, that the relator shall recover his costs of such prosecution; and if judgment shall be

^m R. v. Grimes, 5 Burr. 2598.

(14) Court of King's Bench, courts of sessions of counties palatine, or courts of grand sessions in Wales.

given for the defendant, in such information, he shall recover his costs against such relator; such costs to be levied in manner aforesaid.

In an information against defendant for exercising the office of mayor of Penryn, it appeared, that by the letters patent of incorporation it was directed, that the mayor elect, before he should be admitted to execute his office, should take a corporal oath, before the last mayor, for the faithful execution of his office. The defendant pleaded, that he was elected and duly sworn mayor; and issue being taken in the replication, both as to his being elected and sworn, upon the trial, the jury found that he was elected, but that he was not sworn; and thereupon judgment of ouster was given^a in B. R. Upon writ of error^b brought in D. P. it was insisted, that the judgment was erroneous; for it appeared upon the record, that his right to the office was established by the verdict, which found that he was elected; and yet, whilst this judgment of ouster stood, the plaintiff could not have the effect of a mandamus to be sworn in, though the legality of his election was not disputed, and though no time was limited by the charter for his being sworn in, nor was he by law debarred from having such mandamus, although he acted before he was sworn in. For the defendant, in error, it was contended, that it being expressly required by the charter of incorporation, that the mayor elect should take the oath of office, before he should be admitted to execute such office, it became necessary for the plaintiff, in order to make his justification complete, to allege, that he did accordingly take such oath; and this allegation having been falsified by the verdict, the justification being entire was destroyed, and he was found to be an usurper, and consequently subject to the judgment of ouster, as being the only legal judgment in this case. The judgment of the court of King's Bench was affirmed (15).

In a subsequent term, viz. E. 11 Geo. Str. 625. Pender having applied for a mandamus to swear him into the office to which he had been elected, the court refused to grant it, in consequence of the judgment of ouster, which, according to the opinion of Raymond C. J. did away the election, and, he thought, that without a new election, since the judgment,

^a R. v. Pender, Str. 582. Ld. Raym. ^b 2 Bro. P. C. 294. Tomlin's edit.
1447. 8. C. cited per Curiam.

(15) The judgment was affirmed *without costs*; the judges having delivered it as their opinion, that costs were not recoverable in this case.

the party was not entitled to a mandamus. In this case, Lord Raymond, Powys, and Fortescue Js. concurred in the propriety of the absolute judgment of ouster, which had been given in the former case, Raymond C. J. observing, that he believed no precedent could be shewn, where the judgment was ever entered in any other manner. And Fortescue J. added, that a quo warranto was the king's writ of right, and as against the crown want of swearing in was as much as want of an election; the jury, therefore, having found in effect, that he had no title to the office, it was of course, that he should be excluded from it by the judgment of the court. He remarked also, that he had never heard of any other judgment, and that it was reasonable to exclude a person who appeared to have no title. Reynolds J., however, expressed an opinion, that there ought properly to have been a judgment of ouster *quousque* only, upon the finding of the jury, in the *R. v. Pender*. And in a late case of *R. v. Clarke*, (2 East, 75.) who having been ill sworn in, had afterwards disclaimed upon an information filed against him for usurping the office, and though having submitted to a judgment of complete ouster, he was held to be concluded from setting up again his original right, yet Lord Kenyon intimated, that there might have been a judgment *quousque* only against him. The same point was again agitated in the *R. v. Courtenay*, H. 48 Geo. 3. 9 East, 246. the court, however, being of opinion, that the defendant had been well elected and sworn in, were not required to pronounce any opinion as to the nature of the judgment; but they said, that after diligent search, they could not find any precedent of a judgment of ouster *quousque* upon the files of the court.

In the case of the *King v. Biddle*, Str. 952. the defendant confessed an usurpation during part of the time charged in the information, and from that time insisted on an election. The prosecutor having entered up judgment of ouster, the court ordered, that all the judgment, except that of *capitur pro fine*, might be expunged, observing, that it would be hard that a subsequent good election should be done away, as it would be by the judgment of ouster. And they distinguished it from *Pender's* case, where the party had been guilty of an usurpation during all the time charged in the information.

A quo warranto information has, of late years, been considered merely in the nature of a civil proceeding; and consequently the court will grant a new trial^p.

CHAP. XXXIII.

REPLEVIN.

- I. *In what Cases a Replevin may be maintained.*
- II. *Of the Proceedings in Replevin at Common Law, and the Alterations made therein by Statute.*
- III. *Of the Duty of the Sheriff in the Execution of the Replevin.—Of the Pledges.—Bond from the Party Replevying.—Sureties under Stat. 11 G. 2. c. 19. s. 23.*
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- V. *Of the Process for removing the Cause out of the inferior Court, and herein of the Writs of Habeas Corpus, Recordari facias loquelam, and Accedas ad Curiam.*
- VI. *By whom a Replevin may be maintained.*
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 1. *General Rules, &c. relating to the Avowry.*
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4. *Property.*5. *Statutes :*1. *Of Limitations.*2. *Of Set-off.*IX. *Of the Judgment :*1. *For the Plaintiff.*2. *For the Defendant.*X. *Of the Costs.*I. *In what Cases a Replevin may be maintained.*

IT is said, in 3 Bl. Com. 147. that a replevin is founded on a distress taken wrongfully and without sufficient cause (1) ; whence it may be inferred that the learned commentator supposed that this remedy was *confined* to a taking *by distress*. But, (as it was justly remarked by Lord Redesdale, Ch. in *Shannon v. Shannon*, 1 Sch. & Lef. 527.) this definition of replevin is too narrow, and many old authorities will be found, in the books, of a replevin having been brought where there was not any distress (2). The writ,

(1) Although, generally speaking, wherever there is a distress, replevin may be maintained, yet this rule is not universally true; for it appears from *R. v. Monkhouse*, Str. 1184. that the court directed an attachment to be issued against an under-sheriff, for granting a replevin of goods distrained on a conviction for deer stealing. So a replevin will not lie upon a distress made for a duty to the crown. *R. v. Oliver*, Bunb. 14. But where the plaintiff brought replevin for goods levied under a warrant of distress, for an assessment made by a special sessions under the highway act, 13 G. 3. c. 78. s. 47., on the ground of the premises, for which he was assessed, being situated without the township which was liable to repair the road; the court refused to set aside the proceedings. *Fenton v. Boyle*, Feb. 12th, 1807. C. B. 2 Bos. & Pul. N. R. 399.

(2) *Replegiare est, rem apud alium detentam, cautione legitimâ interpositâ, redimere.* Spelm. Gloss. 485. *Quant les biens ou chattels d'aucun sont prises, il avera per common ley un breve hors de Chancery commandant, &c.* Doct. Plac. Replevin, 313. Replevin lies of all goods and chattels unlawfully taken. Comyns' Dig. Replevin (A). A, replevin is a judicial writ to the sheriff, complaining of an unjust taking and detention of goods and chattels. Gilb. Repl. 58. Note by the learned reporters of the Irish

as was further remarked by *Ld. Redesdale*, is founded on a taking, and the right which the party from whom the goods are taken, has to have them restored to him, until the question of title to the goods is determined. The person who takes them may claim property in them; and if he does, the sheriff cannot deliver the goods until that question is tried; but this claim of property can be made only where there has been a taking; and it appeared to him that the writ of replevin was calculated in such cases to supply the place of detinue or trover, and to prevent the party from whom the goods were taken being put to those actions, except in cases where the other could shew property.

A replevin lies for goods and chattels only^a, hence it cannot be maintained for things affixed to the freehold.

In a replevin for taking the goods and chattels^b, to wit, one lime-kiln, &c. of the plaintiff, to which there was an avowry for rent in arrear, the plaintiff in his plea in bar, said, that the lime-kiln, before and at the said time, when, &c. was affixed to the freehold of the piece or parcel of ground on which, &c. and as such was by law exempt from any distress for the arrears of rent in the avowry mentioned, and ought not to have been distrained for the same, &c. To this plea, the defendant demurred generally. After argument, the court were of opinion, that the plea in bar could not be supported, because it was a departure from the declaration. That the declaration, treating the lime-kiln as a chattel, might possibly be true; because lime may be burnt in a portable oven, and the kiln need not therefore necessarily be affixed to the freehold; but that as the plea in bar stated it to be affixed to the freehold, it was inconsistent with the declaration.

II. *Of the Proceedings in Replevin at Common Law, and the Alterations made therein by Statute.*

AT the common law^c, the proceedings in replevin commenced with suing out of the Court of Chancery a writ of

^a 1 Inst. 145. b.

^b *Niblet v. Smith*, 4 T. R. 504.

^c 2 Inst. 140.

Chancery Cases, temp. *Ld. Redesdale*. See also *Bull. N. P. B.* 2. c. 4.—“Replevin may be brought in *any case* where a man has had his goods taken from him by another.” See also 1 Inst. 145. b.

replevin, directed to the sheriff of the county where the distress was taken. Generally, writs directed to the sheriff gave him a ministerial power only; but the writ of replevin was in the nature of a justicies, not returnable, and gave the sheriff a judicial authority to determine the matter in question between the parties. Thus distinguished from other writs, it was called *festinum remedium*, a speedy remedy; but, notwithstanding the advantage accruing to the subject from the circumstances of its being a justicial writ, it was frequently attended with so much delay as to require the interposition of the legislature. This delay arose from several causes: 1. From the necessity of an application to Chancery, when the distress was taken in a distant part of the kingdom.

To obviate this inconvenience, it is provided by stat. 52 H. 3. (commonly called the statute of Marlebridge) c. 21. that if the beasts (3) of any person are taken and unjustly detained, the sheriff, after complaint made to him, may deliver them without the hindrance or refusal of the person who shall have taken the beasts.

To make this remedy more effectual, and to render the delivery of distresses more expeditious, it is enacted by stat. 1 & 2 Ph. & Ma. c. 12. s. 3. that "Every sheriff of shires, not being cities, or towns made shires, shall, at his first county day, or within two months next after he has received his patent of office, appoint and proclaim, in the shire town, four deputies at the least, dwelling not above twelve miles one from the other, who shall have authority, in the sheriff's name to make replevins, and delivery of distresses, in such manner and form as the sheriffs may and ought to do.

By force of the statute of Marlebridge^d (52 H. 3. c. 21.) the sheriff may hold plea in replevin by *plaint* of any value, and this *plaint* may be taken out of the county court^e, and replevin made immediately^f (4). But it is incumbent on

d 2 Inst. 139.

e Id.

f 1 Inst. 145. b. 2 Inst. 139.

(3) The word in the statute is "*averia*," "*beasts*," but it is usual for the sheriff to hold plea of replevin by *plaint* of other goods and chattels as well as cattle.

(4) This position, which is to be found in 2 Inst. 139. is not warranted by 21 Edw. 4. 66. there referred to. But it is said in Broke, Repl. pl. 46. to be the best opinion. The reason assigned for it by Sir Edw. Coke is, "that it would militate against the

the sheriff to enter the plaint at the next county court, in order that it may appear on the rolls of the court. This statute does not extend to hundred courts. The hundred court, which derives its authority from the county court^s, cannot prescribe to grant replevins by plaint by its steward out of court; for, at common law, the sheriff could only replevy by writ in his county court.

The proceeding by replevin by plaint under the statute has superseded the replevin by writ. The observations, therefore, made in this chapter, with respect to the method of prosecuting replevin, must be understood with reference to the replevin by *plaint*, except where the proceeding by *writ* is expressly mentioned.

2. Another cause of delay at common law proceeded from the sheriffs not being able to enter a liberty without a *non omittas*, where the distress was taken and impounded within any liberty which had return of writs, and the bailiff of such liberty did not pay any regard to the warrant of the sheriff. The statute of Marlebridge has removed the necessity of suing out the *non omittas*, but still the sheriff must make a warrant to the bailiff of the liberty before he can enter.

3. The same cause of delay as that last-mentioned was experienced in cases where the distress, though not taken within a liberty, yet was impounded within it. By force of the statute of Marlebridge, the sheriff may in this case enter the liberty immediately, even without previously issuing a warrant.

III. *Of the Duty of the Sheriff in the Execution of the Replevin—Of the Pledges—Bond from the Party replevying—Sureties under the Stat.*
11 G. 2. c. 19. s. 23.

At the commencement of a suit, it was the duty of the sheriff at the common law, in all actions, to take from the

g Hallet v. Birt, Ld. Raym. 218. Carth. 382. S. C.

scope of the statute, that the owner of the beasts should be deprived of the use of them, until the day on which the county court is holden." The same doctrine is laid down in 1 Inst. 145. b.

plaintiff pledges for the prosecution of his suit. This duty was the same in replevin; but as these pledges were only answerable for the amercement to the king, *pro falsa clamore*, if the plaintiff did not prevail in the suit, they were found insufficient for the security of the defendant in replevin, inasmuch as if the party distrained upon, either sold or eloiigned the distress after the replevy, the defendant was wholly prevented from reaping any advantage from an award of a return. To remedy this mischief the stat. Westm. 2. (13 Ed. 1.) c. 2. requires the sheriff, before he makes deliverance of the distress, to take from the plaintiff not only pledges for the prosecution of the suit, but also for the return of the beasts, if a return be awarded. And if the sheriff take pledges in any other manner, he is to answer for the price of the cattle to the distrainers; and if the bailiff has not wherewith to make restitution, it is to be made by his superior.

The course pursued by sheriffs, or other officers making replevins, in carrying into effect the provisions of this statute, does not appear to have been uniform. Two different methods have been adopted by them for the protection of the defendant. The first method has been to take a bond from *the pledges* conditioned for the appearance of the party replevying at the next county courtⁱ, for his prosecuting his suit with effect, and making return of the distress, if return should be adjudged. In taking this security^k, the sheriff has been considered as pursuing the directions of the statute; for the word pledges has been holden to be synonymous with sureties.

The other method has been to take a bond *from the party replevying* (5); the condition of which is similar to the former, viz. that the obligor will appear at the next county court, and then and there prosecute his suit with effect, and also that he will make return of the beasts, if return thereof be adjudged by law (6).

i Dalton's Shff. 439. k Ld. Raym. 278. Lutw. 687. Dalton's Shff. 438.

(5) I have not been able to discover the origin or first introduction of these securities, and, consequently, I cannot ascertain which is the most ancient. The usage has been not to take both securities at the same time, but the sheriff has exercised his discretion in taking either one or the other, as seemed most convenient. The bond from the party replevying has, I believe, been most generally adopted.

(6) "In all replevin bonds there are several independent conditions; one to prosecute, another to return the goods replevied,

Although the statute of Westm. 2d. c. 2. is entirely silent as to a bond from the party replevying, yet it has been decided that bonds of this kind are lawful¹, and if the condition be not performed, an action may be brought on them.

It does not appear that the sum in which these securities, viz. the bond from the pledges, or the bond from the party replevying, should be taken, has ever been ascertained. To provide, therefore, a more effectual security for defendants, by fixing the responsibility of the sureties, and to prevent vexatious replevins in cases of distress for *rent arrear*, it is enacted by stat. 11 G. 2. c. 19. s. 23. "that sheriffs, and other officers having authority to grant replevins, *shall* (7), in every replevin of distress for *rent*, before any deliverance of the distress, take *in their own names* from the plaintiff and two responsible persons, as sureties, a bond in double the value of the goods, conditioned for prosecuting the suit with effect, and without delay, and for duly returning the distress in case a return shall be awarded." The statute then proceeds to authorise the sheriff or other officer to assign such bond to the avowant, or person making cognisance, who may maintain an action upon it in the superior courts^m, in the event of its being forfeited. In this action, if the declaration state that the plaintiff, as bailiff of one J. S. distrained, &c. it is sufficient, without stating that the plaintiff, at the time of the assignment of the bond, was either avowant or person making cognisance in the suit in replevinⁿ.

In *Chapman v. Butcher*, Carth. 248. the plaintiff in replevin had given a bond to the bailiffs of the borough of New Windsor, conditioned to prosecute his suit with effect in the court of record of that borough, and to make return, if return should be adjudged by law. A replevin was

¹ *Blackett v. Crisp*, 1 Ld. Raym. m *Dias v. Freeman*, 5 T. R. 195.
278. n Ib.

and a third to indemnify the sheriff; and a breach may be assigned upon any of these distinct conditions." Per Lee C. J. delivering the opinion of the court in *Morgan v. Griffith*, M. 14 G. 2. B. R. 7 Mod. 380. Leach's ed.

(7) If the sheriff or other officer neglect to take a bond, according to the directions of this statute, the courts will not grant an attachment against him, such negligence not being an abuse of any process of the courts. *Twells v. Colville*, Willes, 375. R. v. Lewis, 2 T. R. 617.

brought in the borough court, and judgment given for the defendant, which was afterwards reversed in the Court of King's Bench, on error, and a new judgment was given that the plaint should abate, and that the defendant should have a return. An action was brought on the bond, *and it was holden a lawful bond, and the court said, that it was the common course to take such bonds.* With respect to the condition, it was determined, that it was not confined to a prosecution in the court of Windsor, but extended to the prosecution of a writ of error in the King's Bench, for that was part of the suit commenced below; and by the words, "if a return should be adjudged by law," the condition was not confined to the judgment of any particular court (8), for which reasons the court gave judgment for the bailiffs, the obligees.

So where the condition of the replevin bond was to appear in the county court, and *then* and *there* to prosecute with effect; it was holden, that the words *then* and *there* related to so much of the prosecution as should be in the county court, but that they did not restrain it, and that the bond was forfeited, the plaintiff having been nonsuited in the superior court, to which the cause had been removed.

Plaintiff in replevin having given a bond to prosecute his suit with effect^o, levied a plaint against the defendant, who obtained an injunction to stay proceedings until a certain day, on which the plaintiff in replevin died; it was adjudged, that the plaintiff had prosecuted his suit with effect, there not having been either a nonsuit or a verdict against him; and Holt C. J. compared it to the case of a recognisance on a writ of error, which was to prosecute with effect; there, if the plaintiff was not nonsuit, nor the judgment affirmed, the recognisance was not forfeited.

In an action brought by the assignee of a replevin bond^p,

- ^o *Vaughan v. Norris*, Ca. Temp. q *Barker v. Horton*, C. B. 17 Geo. 2. Hardw. 137. Willes, 460.
^p *D. of Ormound v. Bierly*, Carth. 519.
 and 19 Mod. 380.

(8) "To prosecute with effect, the plaintiff must not only proceed to a decision of the suit, but must have success in it, or he does nothing; and it is not a completion of the condition to have levied a plaint in the county court; for the words extend to all the proceedings, from the original to the conclusion of the action, as well in the court below as in the superior court, by *re. fa. lo.* which is the case in Carth. 249." Per Lee C. J. delivering the opinion of the court in *Morgan v. Griffith*, 7 Mod. 380. Leach's ed.

where it did not appear on the face of the declaration, that the plaintiff was the avowant, or person making cognisance, the court referred to the replevin suit, which was of record in the same court, for the purpose of ascertaining the fact, the declaration concluding *prout patet per recordum*.

The breach assigned in the declaration ought to pursue the condition of the bond, but it is not necessary that it should extend any further^r.

The sureties are liable only to the amount of the penalty in the bond, and costs of suit on the bond^s.

When the defendant has obtained judgment for a return, if the sheriff return to the writ *de retorno habendo*, that the cattle are eloiigned, the defendant may, if the sheriff has not taken any pledges^t, or, what amounts to the same thing, has taken such as are insufficient^u, immediately, without any previous proceedings (9), commence an action on the case^v (10) against the sheriff; in which action (since the 11 Geo. 2. c. 19. s. 23.), in cases of a distress for rent arrear, three different resolutions have taken place with respect to the extent of the sheriff's liability. The first case^w decided, that the statute 11 Geo. 2. c. 19. s. 23. had not enlarged the responsibility of the sheriff, and that the value of the goods distrained ought to be the measure of the damages against him, as it was under the stat. Westm. 2. (13 Edw. 1.) c. 2. In the second case^x, it was resolved, that as the proceeding against the sheriff was an action on the case for a culpable neglect of duty, the plaintiff was entitled to recover a full compensation for the injury sustained

^r 5 T. R. 195.

^s Hefford v. Alger, 1 Taunt. R. 218.

^t Moyser v. Gray, Cro. Car. 446.

Anon. Sir W. Jones, 278.

^u Rouse v. Patterson, 16 Vin. 399, 400.

^v 7 Mod. 387. Leach's ed. Bull. N. P. 60. S. C.

^x This method of proceeding against the sheriff was settled, after much debate, in Rouse v. Patterson.

^y Yea v. Lethbridge, 4 T. R. 433.

^z Concanen v. Lethbridge, 2 H. Bl. 36.

(9) Formerly, where the sheriff had taken insufficient pledges, it was the practice to proceed in the first instance by *scire facias* against the pledges. A detailed account of this method is given in the 1st. vol. of Serjt. Wms. ed. of Saunders, p. 195. a. n. (3), and Gilb. Repl. cap. 2. s. VII. 4.

(10) In this action, some evidence must be given by the plaintiff of the insufficiency of the pledges, but very slight evidence is sufficient to throw the burthen of proof on the sheriff. Saunders v. Darling, Middx. Sittings, Trin. 10 Geo. 3. C. B. Bull. N. P. 60.

by him in consequence of that neglect, although such compensation exceeded double the value of the goods distrained (11); but in the third and last determination* it was holden, that the sheriff should not be liable any farther than the sureties would have been, if he had done his duty, and taken a bond, and they had been sufficient; and that, as the responsibility of the sureties was limited by the statute to double the value of the goods distrained, that sum ought to be the measure of the damages.

In *Richards v. Acton*, 2 Bl. Rep. 1220. the Court of Common Pleas, on a summary application, made a rule on the sheriff, under-sheriff, and the replevin clerk, who had refused to discover the names of the pledges taken on granting the replevin, to pay to the defendant in replevin the damages (12) and costs recovered by him.

On an application to the Court of C. B.^b for a rule to shew cause why the officer of the court below should not pay the costs recovered by the defendant in replevin, on account of the insufficiency of the pledges taken by him *de retorno habendo*, the court refused to grant the rule; observing, that the defendant's remedy was by action, there not having been any cause in the court at the time when the replevin bond was taken.

a *Evans v. Brander*, 2 H. Bl. 547.

b *Tesseyman v. Gildart*, 1 Bos. & Pal. N. R. 292.

(11) The damages given by the jury in this case were 100*l*.

The rent in arrear was	-	£10	10	0
The costs of the replevin suit		84	0	0
Expense of <i>de retorno habendo</i>		5	0	0

£99 10 0

The value of the goods was 22*l*. 4*s*.; and the penalty of the bond was 50*l*.—The court permitted the verdict to be entered for the whole sum (100*l*.) found by the jury. In *Pattison v. Prowse*, the damages given by the jury, for which judgment was entered, were made up of the costs of the replevin suit, and the rent in arrear, but there the value of the goods was more than the sum for which the judgment was entered.

(12) Nothing was said in this case respecting the quantum of damages; but it is conceived, that since the case of *Evans v. Brander*, if a similar application should be made, the court would not compel the sheriff, or other officer granting replevin, to pay more than double the value of the goods distrained.

IV. *Of claiming Property, and of the Writ de Proprietate probandâ.*

IF the defendant claims property^c, the sheriff's power to re-deliver the beasts is suspended, and the plaintiff must sue out a writ *de proprietate probandâ*, or of proving property, because questions of property cannot be determined in the county court without the king's writ.

On the purchasing the writ *de proprietate probandâ*, an inquest of office is holden; and if on such inquest the property be found for the plaintiff, the sheriff is to make deliverance; but if it be found for the defendant, the replevin by *plaint* is determined, and the sheriff cannot proceed any farther: yet the plaintiff may bring a new replevin *by writ*; for what is done on the *plaint* will not operate as a bar, because it is not connected with the proceeding by writ.

Property must be claimed by the defendant in person^d; it cannot be claimed by his bailiff or servant. A bailiff cannot claim property below, because being only servant to another, in whose right he has taken the goods, he cannot say that they are his own; but the bailiff above may *plead* property in a stranger, for this is a sufficient reason to excuse him from damages, since he has not taken the plaintiff's goods from him.

V. *Of the Process for removing the Cause out of the inferior Court; and herein of the Writs of Pone, Recordari facias loquelam, and Accedas ad Curiam.*

FOUR different forms of writs are prescribed by law for the removal of the proceedings in replevin out of an inferior into a superior court:

1. The writ of pone at common law.
2. The writ of pone under the statute of Westminster the 2d. (13 Edw. 1.) c. 2.
3. The writ of recordari facias loquelam.
4. The writ of accedas ad curiam.

c 1 Inst. 145, b.

d 1 Inst. 145, b

1. Of the Writ of Pone at Common Law

When the proceedings in the county court were instituted by writ out of chancery, and the plaintiff was desirous of removing them, this was the proper form of writ for that purpose; but the proceeding in replevin by writ having fallen into disuse, the writ of pone has consequently shared the same fate; it will not be necessary, therefore, to trouble the reader with an explanation of it. The different forms of this writ, as adapted to a removal into the Courts of King's Bench and Common Pleas will be found in F. N. B. 69. M.

2. Of the Writ of Pone under the Stat. Westm. 2d.

At the common law, where the lord avowed taking the distress for services or customs, if the plaintiff disavowed the tenure, and disclaimed holding of the avowant, the inferior court had not any farther cognisance of the suit, and the proceeding there was stayed; because the disclaimer brought the freehold in question, which the county court, not being a court of record, had not any authority to try. This inconvenience was remedied by the stat. Westm. 2. (13 Ed. 1. c. 2.) which gave the avowant in this case the writ of pone to remove the proceedings into the king's courts. It appears from the preamble, that the avowant is entitled to this writ of pone, as well where the proceedings are instituted in the inferior court by *plaint*, as where they are commenced by writ out of chancery. There is one passage in this statute which is worthy of remark, because it may be inferred from it, that before this statute the defendant in replevin could not remove the proceedings out of the inferior court (13). The words are these:

Nec per istud statutum derogatur legi communi usitatae, quod non permisit aliquod placitum poni coram justiciariis ad petitionem defendentis; quia licet primâ facie videatur tenens actor; et dominus defendens, habito tamen respectu ad hoc quod dominus distrinxit; et sequitur pro servitiis et consuetudinibus sibi a retro existentibus, realiter apparebit potius actor; sine querens, quam defendens.

(13) I am aware that Sir Edw. Coke has given a different explanation of this passage in the 2d Inst. p. 339, but his explanation seems to be at variance with the context.

3. *Of the Writ of Recordari facias loquelam.*

This form of writ is adapted to the removal of the proceedings in replevin^e, when they have been instituted in the county court by plaint, and not by writ; and as the method of suing by plaint has superseded the ancient method of proceeding by writ, the *recordari facias loquelam* is the writ now in general use. By this writ the sheriff is commanded to record the plaint, and, when recorded, to return it into the King's Bench or Common Pleas at a fixed day, on which the parties are to attend in court. This being done, the superior courts have authority to proceed.

When the record is removed^f, and the party declares *in banco*, the plaint is determined. Hence advantage cannot be taken of a variance between the plaint and the declaration in the superior court.

By virtue of the writ of *re. fa. lo.* the plaint may be removed either by the plaintiff or defendant; but the defendant must allege in the writ some cause of removal; this allegation^g, however, is not a material point of the writ, and the defendant may avow or justify the taking and detention on other grounds.

The delivery of the *re. fa. lo.* to the clerk of a county court, after interlocutory and before final judgment, is a bar to any farther proceeding in that court.

The officer of the inferior court cannot refuse paying obedience to the writ^h, under pretence of his fees not having been paid, because he may bring an action for such fees.

4. *Of the Writ of Accedas ad Curiam.*

This writ is only a species of *re. fa. lo.* adapted to the removal of replevins, sued by plaint in the *Lord's Court*. It derives its name from the language of the writ, "*accedas ad curiam W. de C. et in illâ plenâ curiâ recordari facias loquelam, quæ est in eâdem curiâ sine brevi nostro*," &c. See the form of this writ in Gilb. Repl. 145. ed. 1737.

N. If the writ of removal is made returnable on the first return of the termⁱ, it is incumbent on the plaintiff to de-

^e F. N. B. 70. B.

^h *Bevan v. Protheak*, 2 Burr. 1151.

^f *Hargreave v. Arden*, Cro. Eliz. 543. ⁱ *Thompson v. Jordan*, 2 Bos. & Pul.

^g 10 Ed. 2. *Avowry*, 213. 20 Ed. 3. 137.

Avowry, 130.

clare in the superior court within four days before the end of that term; otherwise the defendant (although he has not appeared) will be entitled to an imparlance.

VI. *By whom a Replevin may be maintained.*

To maintain replevin, the plaintiff ought to have either an absolute or special property^k in the goods in question vested in him at the time of the taking (14): A mere possessory right is not sufficient^l.

If the goods of a feme sole are taken, and she marries, the husband alone may (15) sue the replevin; because the property is transferred by the marriage, and vested absolutely in the husband, so that he may release it; and, consequently, he may have an action in his own name to bring back the property^m.

If the goods are taken *after* marriage, husband and wife ought not to join in the replevin; but if they do join in the action, and after verdict a motion is made on this ground in arrest of judgment, it will be presumed that the husband and wife were jointly possessed of the goods before marriage, and that the goods were taken before marriage, in which case the husband and wife might joinⁿ.

Executors may maintain replevin for the goods of the testator taken in his life-time^o.

Parties who have a joint interest in the distress may join in the replevin^p, but where the interest in the goods taken is several^q, there ought to be several replevins.

k Bro. Repl. pl. 8. 20.

l Per cur. in *Templeman v. Case*, 10

Mod. 25.

m F. N. B. 69. K.

n *Bourn et Ux. v. Mattaire*, Ca. Temp. Hardw. 119.

o Bro. Repl. pl. 59.

p 3 H. 4. 16. a. 1 Inst. 145. b.

q Bro. Abr. Repl. pl. 12.

(14) There are two kinds of property, a general property which every absolute owner has, and a special property, as goods pledged or taken to manure his lands, or the like, and of both these a replevin lies. 1 Inst. 145. b.

(15) Or the husband and wife may join. Agreed by Lord Hardwicke C. J. in *Bourn v. Mattaire*, Ca. Temp. Hardw. 119. See ante, p. 265.

VII. *Of the Declaration.*

Venue.—THE venue must be laid in the county in which the distress was taken.

Locus in quo.—The place in which the distress was taken, technically termed the *locus in quo*, as well as the vill or parish, must be named in the declaration; because the right of caption may turn on the place, and the freehold may come in question^r.

If the *locus in quo* be not named, the defendant may take advantage of the omission by special demurrer^s, but if he plead over, the defect is cured^t.

This obligation on the plaintiff to name the *locus in quo*, has, from the supposed difficulty of ascertaining it in *all* cases, been frequently considered as a great hardship. It must be admitted, that if the law required the plaintiff to name the place, where the distress was *first* taken, such a rule might deserve censure; but the law does not require such strictness; it being sufficient for the plaintiff to name that place in which he finds the defendant *in possession* of the distress^u; for the law considers the distress as wrongfully taken in every place in which the defendant may have it in his custody (16).

Hence where the plaintiff declared of a taking in A.^x, and the defendant pleaded *non cepit modo et formâ*, the plaintiff having proved that he found the cattle in the possession of the defendant in A., it was adjudged sufficient, although the defendant proved, that he first took them in B., and was only driving them through A. to the pound (17).

^r 2 H. 6. 14. a.

^s Ward v. Lavile, Cro. Eliz. 896.

Moor, 678. S. C. under the name of

Ward v. Lakin. See also Read and

Hawke's case, the arguments in

which are reported in Godb. 186.

and the judgment of the court in Hob. 16. and 1 Brownl. 176.

^t Bullythorp v. Turner, Willes, 476.

and per Bridgman C. J. 1 Sidg. 10.

^u Per Chambre J. 2 Bos. & Pul. 481.

^x Walton v. Kersop, 2 Wils. 354.

(16) If the distress be taken in one county, and carried into another, the plaintiff may have replevin in either county, because it is a caption in every county into which the distress is taken by the defendant. F.N.B. 69. I. Doct. Pla. 315. See also Bro. Repl. pl. 63.

(17) If the defendant never had the goods in the place named in the declaration, *non cepit modo et formâ* seems a proper plea, where the defendant does not seek a return.

The plaintiff declared for taking guns *in quodam loco vocat.* the

If the replevin be brought in an inferior court, the *locus in quo* must be alleged to be within the jurisdiction of the court⁷.

With respect to the description of the goods taken⁸, it is stated in some of the books as a rule, that the goods must be described in the declaration with such certainty, that the sheriff may make re-deliverance of them.

The following cases contain all the learning on this subject :

Replevin for taking *bona et catalla sua*⁹, viz. *quandam parcell' linte' et quandam parcell' papyri ipsius querentis*; the defendant avowed the taking as a distress for rent arrear. Verdict for the plaintiff with entire damages. It was objected, in arrest of judgment, that "*quandam parcell' papyri et linte'*" was too general and uncertain a description; and although it might be well enough in trover and trespass, yet it was ill in replevin; because it was not a sufficient direction to the jury in assessing the damages, nor to the sheriff in re-delivering the goods: but Parker C. J. observed, that although the declaration would have been ill on demurrer, yet the pleadings had supplied the defect; because the defendant having avowed the taking, he had thereby admitted that he knew what the goods were, and consequently, both parties agreeing on this point, the only question was, who should have them. He added, that it would not be of any advantage to the defendant to have the goods particularized; because, if the plaintiff should demand 500 reams of paper, and prove that the defendant had wrongfully taken one only, yet he would be entitled to recover, agreeably to the rule, that in actions on torts, it is sufficient for the plaintiff to prove part only of his declaration; and as to the necessity of an exact description of the goods on account of the re-delivery by the sheriff upon the *retorn' habend'*, he observed,

y *Quarles v. Searle*, Cro. Jac. 95.

z See *Buller's Nisi Prius*, p. 53.

a *Kempster v. Nelson*, Pasch. 13 Ann.

4 Bac. Abr. 397. cited and recognised in *Bern v. Mattaire*, Ca. Temp. Hardw. 121.

Minories; the defendant pleaded *non cepit modo et formâ*. At the trial the plaintiff proved the taking at a place in Surrey, upon which it was objected, that he had failed in proving his issue; to which Pratt C. J. assented, observing, that where the defendant does not insist on a return, he may plead *non cepit modo et formâ*, and prove the taking to be at another place; the plaintiff was nonsuited. *Johnson v. Wollyer*, Str. 507.

that the sheriff might require the defendant to shew him the goods (18), and that it was a good return for the sheriff to make, "that no person came on the part of the defendant to shew him the goods," and that such a return might be found in Rastall's Entries, and Dalton's Sheriff, c. 73.

So where in replevin for taking fourteen skimmers and ladles^b, and three pots and covers, an exception was taken, after verdict, in arrest of judgment, to the declaration, for uncertainty in the description, in not expressing how many of each sort were taken; the court, adopting the reasons of Parker C. J. in the preceding case, were of opinion, that the declaration was sufficient, and gave judgment for the plaintiff.

VIII. Of the Pleadings :

1. *Of Pleas in Abatement, and herein of the Plea of Cepit in alio Loco.*
2. *General Issue.*
3. *Of the Avowry and Cognisance :*
 1. *General Rules, &c. relating to the Avowry.*
 2. *Of the Avowry for Damage feasant—Pleas in Bar—Escape through Defect of Fences—Right of Common—Tender of Amends.*
 3. *Of the Avowry for Rent Arrear—Pleas in Bar—Eviction—Non Dimisit—Non Tenuit—Riens in Arrear—Tender of Arrears.*
4. *Property.*
5. *Statutes :*
 1. *Of Limitations.*
 2. *Of Set-off.*

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1. *Of Pleas in Abatement, and herein of the Plea of Cepit in alio Loco.*

THERE is a difference between pleas in abatement in re-

^b *Bern v. Mattaire, Ca. Temp. Hardw. 194.*

(18) This argument has frequently been urged, when exceptions in arrest of judgment have been made in actions of eject-

plevin, and in other actions arising from the peculiar nature of the proceedings in replevin. In other actions, as actions of assumpsit, debt, or trespass, the plaintiff is not put in possession of any thing until after judgment and execution thereon; as soon, therefore, as the writ or count is quashed, by a judgment for the defendant, on a plea in abatement, the defendant is thereby restored to the same situation in which he was before the action was brought: but in replevin the mere quashing the writ or count does not afford the defendant complete redress, the plaintiff being in possession of the defendant's goods by previous delivery from the sheriff. To remedy this inconvenience, and to entitle himself to a return of the distress, the defendant must, to a plea of abatement in replevin, subjoin a suggestion in the nature of an avowry or cognisance. As this suggestion, however, is merely for the purpose of a return, the matter of it is not traversable^c

To the plea of *cepit in alio loco*^d, the defendant must add a suggestion of this kind, if he seeks a return.

Of the Plea of Cepit in alio Loco.

The defendant pleaded *cepit in alio loco*^e, and prayed judgment of the court, and that the count be quashed. On demurrer, the question was, whether the plea ought not to have prayed judgment of the writ; but it was insisted, that the place being mentioned in the count only, and not in the writ, the exception was properly taken to the count, where the fault was. The court gave judgment for the plaintiff, being of opinion that the conclusion was good.

But though this plea properly concludes with a prayer of judgment of the count or declaration, yet in a case^f where to replevin for taking the plaintiff's goods at the parish of St. Mary-le-Bow, in the ward of Cheap, in London, the defendant in his plea prayed judgment of the declaration, because he took the goods in the parish of St. Martin, Ludgate Without, in the ward of Farringdon Without, in London, in a certain dwelling-house there, called the White

^c Foot's case, Salk. 93. Willes, 475. ^e Docket v. Booth, B. R. E. 1 G. 2. d Bro. Repl. pl. 45. Anon. Salk. 94. MSS.

^f Bullythorpe v. Turner, Willes, 475.

ment, for uncertainty of description in the declaration. See *Portman v. Morgan*, Cro. Eliz. 465.

Swan, without this, that he took them at the parish of St. Mary-le-Bow, in the ward of Cheap, and this he is ready to verify; wherefore he prays judgment of the declaration, and added a suggestion in the nature of an avowry for a return; it was holden, that the plea of the defendant was a plea in bar, and not a plea in abatement, for the following reasons; 1st, because the place in replevin is of the essence of the action, otherwise a defendant in replevin could not demur for want of a certain place in the declaration; 2dly, because in a plea in abatement, an objection cannot be made for any defect in the declaration; in support of this reason, *Hastrop v. Hastings*, Salk. 212. was cited; 3dly, because, upon inquiring of the officers in the Court of Common Pleas and in the King's Bench, it was not found that an affidavit had ever been made of the truth of this plea, as is required in pleas in abatement by stat. 4 & 5 Ann. c. 16.; nor were defendants obliged to put in such pleas within the first four days of the term, as pleas in abatement must be by the course of the court; 4thly, because it appeared by the manner of pleading these pleas, and the judgment given upon them, that they had always been considered as pleas in bar; lastly, because whoever pleads a plea in abatement must shew that the plaintiff can have a better writ, whereas he cannot have a better writ in the present case; for it is in the usual form, as appears by the register, fo. 81. and Glanville, l. 12. c. 12.

2. *The general Issue.*

The general issue in replevin is "*non cepit*," by which the property is admitted to be in the plaintiff, and the caption only put in issue.

g 1 Rast. Entr. 553. pl. 4, 5. 556. pl. 7. Thomps. Ent. 274. pl. 11. Clift's Entr. 644.

8. Of the Avowry and Cognisance;

1. General Rules, &c. relating to the Avowry.

2. Of the Avowry for Damage feasant— Pleas in Bar—Escape through Defect of Fences—Right of Common—Tender of Amends.

3. Of the Avowry for Rent Arrear—Pleas in Bar—Ejection—Non Dimittis—Non Tenuit—Rents in Arrear—Tender of Arrears.

1. *General Rules, &c. relating to the Avowry.*—The avowry or cognisance, which is in the nature of a declaration, ought to contain sufficient matter, upon which the avowant, or person making cognisance, may have judgment for a return (19). But if the avowry, &c. be defective in form, or if circumstance of time, place, &c. should be omitted, such omission may be helped by the plea of the adverse party; otherwise it is of a defect in substance^k. The avowry^l, &c. must answer every material part of the declaration; hence if the plaintiff alleges a taking in two places, and the defendant avows as to one only, it is a discontinuance. So if the declaration be for taking goods^k, chattels, and beasts; and the avowry is confined to the taking the beasts only, it will be bad on demurrer.

By stat. 4 Ann. c. 16. s. 4. any defendant in any action, or any plaintiff in replevin, in any court of record, may, with leave of the court, plead as many several matters thereto as he shall think necessary for his defence.

An avowant is a defendant within the meaning of this section, and may plead several avowries with leave of the court (20).

^h Butt's case, C. B. 7 Rep. 25. a.
ⁱ Weeks v. Speed, Salk. 94.

^k Hunt v. Braines, 4 Mod. 402.

(19) "In replevin, because the avowant is to have a return, he ought to make a good title in omnibus." Per cur. Goodman v. Aylin, Yelv. 148.

(20) I am not aware of any authority for this position, but it has been so considered in practice, and it is confirmed by the case of Stone v. Forsyth, Dougl. 708. n. 2. where an avowant was considered as a defendant within the 5th section of the same sta-

In replevin for taking cattle¹, the defendant made cognisance as bailiff to J. S.; the plaintiff traversed the defendant being bailiff to J. S. On demurrer, after argument, it was holden, that the traverse was well taken; for although J. S. had a right to take the cattle, yet a stranger, without his authority, could not; and that, as both parts of the cognisance must be true, an answer to either part was sufficient (21).

2. *Of the Avowry for Damage feasant.*—The defendant may state in his avowry, that the *locus in quo* was his *soil and freehold*, (without specifying whether he had an estate in fee, fee-tail, or for life,) and that he took the plaintiff's cattle because they were doing damage there. From this

1 Trevilian v. Pyne, Salk. 107.

tute, and holden to be liable to pay costs on the avowries found against him.

(21) Prior decisions on this point are very contradictory. I have abridged the last determination, which has, I believe, been considered as law ever since. It was recognised by Burnett J. in *George v. Kinch*, T. 17 & 18 G. 2. C. B. 7 Mod. 481. Leach's ed. where he says, "This distinction as to traversing of commands is laid down in *Trevilian v. Pyne*, namely, that in *clausum fregit* the command is not traversable; but it is otherwise in replevin, or trespass laid transitorily, as for taking cattle or goods. In trespass *quare clausum fregit*, which is a local trespass, if defendant justify an entry into the close by the command of, or as bailiff to A., in whom he alleges the freehold to be, the plaintiff cannot in his replication traverse such command, because it would admit the freehold to be in A., and not in himself, which would be sufficient to bar his action, although the defendant had no such command*; for it is not material that the defendant has done wrong to a stranger, if it be not any to the plaintiff. But in replevin or trespass for taking goods or cattle, if the defendant justify by a command from, or as bailiff to A., in whom he states a title to take them as for distress or other cause, there it may be material to traverse the command or authority; for though A. has a right to take the goods or cattle, yet a stranger who had not any authority from him, will be liable; so that both parts of the defendant's plea must be true, and, therefore, an answer to any part is sufficient." In *Robinson v. Douglas*, Trin. 1681, C. B. Freem. 535. it was admitted by the court, that the plaintiff in replevin might traverse the defendant's being bailiff. If the reader wishes to pursue the subject, he will find the authorities bearing upon this point collected in *Sergeant Williams's Saunders*, vol. 1. p. 347. c. note (4).

* This distinction is now exploded, and the plaintiff may traverse the command in trespass *qu. cl. fr.* as well as in replevin. *Chambers v. Douglass*, 11 East 66.

plea it will be intended, that it is the avowant's sole freehold, and in his own right; consequently, if the avowant be seised merely in right of his wife, that ought to be specially stated^m; and although this general form of pleading soil and freehold be allowed, yet if the defendant does not pursue this form, but merely alleges that he is *seised*, without shewing of what estate, the avowry will be bad on special demurrerⁿ for uncertainty. So, it seems, if defendant plead by way of justification of the taking, that he was *possessed* (22) of a messuage, with common appurtenant, and that the plaintiff's cattle were doing damage on the common, and conclude in bar *without praying a return*, such plea is bad^o.

As tenants in common must join in actions concerning the personalty^p, one tenant in common cannot avow alone for taking cattle damage feasant; because it is an injury to the possession, and an avowry of this kind is in the nature of a declaration in trespass for an injury done to the possession.

An avowry for damage feasant in a place where the avowant had a right of common^q, must allege special damage, viz. that the avowant could not enjoy his common in so ample and beneficial a manner.

The declarations of the person under whom a defendant makes cognisance are not evidence for the plaintiff^r.

Pleas in Bar. Escape through Defect of Fences.—In a plea in bar of an avowry for taking cattle damage feasant, viz.

m Bonner v. Walker, Cro. Eliz. 524.
n Saunders v. Hussey, Carth. 9. 1 Ld. Rayn. 332. 2 Lutw. 1231.
o Hawkins v. Eckles, 2 Bos. & Pul. 359.

p Culley v. Spearman, 2 H. Bl. 386.
q Woolton v. Salter, 3 Lev. 104.
r Hart v. Horn, 2 Camp. N. P. C. 92.

(22) There is a difference in this respect between replevin and trespass for taking cattle or goods; for to trespass for taking cattle or goods, the defendant may plead generally that he was *possessed* of a close, and that he took the cattle or goods damage feasant therein. Anon. Salk. 643. 11 Mod. 219. S. C. ut videtur, under the name of Harrington v. Bush. Searl v. Bunion, 2 Mod. 70. Langford v. Webber, Carth. 9. 3 Mod. 132. S. C. The reason of this distinction appears to be this, that where the interest of the land is not in question, the defendant may justify upon his own possession against a wrong doer. But such a justification will not be good as against the person who has the title to the land, and who makes an entry in, and puts the cattle or goods there in pursuance of that title. Taylor v. Eastwood, 1 East, 212.

that the cattle escaped from a public highway into the *locus in quo*, through defect of fences, it must be shewn, that they were *passing* on the highway when they escaped; it is not sufficient to state, that *being* in the highway they escaped; for that word is equivocal, and does not shew whether the cattle were passing and repassing, or whether they were trespassing on the highway* (23).

Right of Common.—To an avowry for damage feasant, a right of common may be pleaded in bar (24).

In a prescription for a right of common during a certain portion of the year only¹, it must appear on the face of the plea, that the right was exercised during the time allowed.

In an avowry the defendant stated², that he was seised in fee of a messuage, with the appurtenances, situate, &c. “and that he and all those whose estate he had *from time whereof*, &c. have, and of right, *during all the time aforesaid*, ought to have had, and still of right ought to have, common of pasture in the place in question for a certain number of cattle as appurtenant to the messuage.” On special demurrer, assigning for cause, that it was not stated in the avowry at what time, or for what period of time, the avowant had common of pasture in the place in question, nor whether he had common every year, or in what part or period of the year; the avowry was holden to be bad.

A copyholder claiming common in the soil of other persons than the lord³, cannot prescribe *in his own name* on account of the weakness of his estate; he ought to prescribe in the name of the lord, viz. “that the lord of the manor and all his ancestors, and all those whose estate he has, had

¹ *Dovaston v. Payne*, 2 H. Bl. 527.
² Cro. Jac. 637.

³ *Hawkins v. Eckles*, 2 Bos. & Pul.
359.
⁴ 4 Rep. 31. b.

(23) “If the cattle of one person escape into the land of another, it is not any excuse that the fences were out of repair, if the cattle were trespassers in the close whence they came.” Per Heath J. in *Dovaston v. Payne*, 2 H. Bl. 527. See also a similar opinion expressed by Wilmut C. J. in 3 Wils. 126.

So in an action for digging a pit in a common, into which the plaintiff's mare fell and was killed; it was holden, that the declaration ought to have stated, that the mare was *lawfully* on the common, otherwise the digging the pit, as against the plaintiff, was justifiable, and although the plaintiff's mare fell in, yet it was *damnum absque injuria*. *Blyth v. Topham*, Cro. Jac. 158.

(24) For the nature of this right see ante, tit. Common.

common in such a place for himself and his tenants at will," &c. But where a copyholder claims common in the soil of the lord, then he cannot prescribe in the name of the lord; for the lord cannot prescribe to have common in his own soil, and as the copyholder cannot prescribe in his own name, he must allege, that "within the manor there is a custom from time immemorial, that all customary tenants of certain messuages have common in such a place," &c. (25).

y Gateward's case, 6 Rep. 60. b.

(25) "If the issue be on a right of common, which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible, because as it depends upon a custom, the record in that action would be evidence in a subsequent action brought by that very witness to try the same right; therefore there is a good reason for not receiving his testimony in such case. But the same reason does not hold where common is claimed by prescription in right of a particular estate; because it does not follow, if A. has a prescriptive right of common belonging to his estate, that B., who has another estate in the same manor, must have the same right; neither would the judgment for A. be evidence for B.; and yet there are cases, which lay it down as a general rule, that one commoner is in no case a witness for another. Per Buller J. in *Walton v. Shelley*, 1 T. R. 302. *Harvey v. Collison*, ante p. 391., S. P.

The plaintiff prescribed for common of pasture, upon Hampton Common, for all cattle, *levant and couchant* upon his ancient messuage, &c.* as appurtenant thereto, and declared that the defendant was bound, by reason of his occupation, to repair the fence of his close contiguous to the common, and permitted it to be ruinous, whereby the plaintiff's cattle escaped, and plaintiff lost the use of them. At the trial, the plaintiff called several witnesses, inhabitants of Hampton, who deposed, that all inhabitants in Hampton, paying church and poor, had a right to turn their cattle upon the common. The court held, that the question to be considered was, whether commoners, having a common interest in the preservation of this hedge, could be competent witnesses for each other? It might be, that no one was bound to repair it. It might be, that a hayward was usually paid by the commoners to keep their cattle on the common. But the production of this record would be evidence for another commoner, that the occupier of the adjacent land was bound to repair this fence. The commoner, therefore, would derive an advantage, by exonerating himself from the charge of maintaining a hayward, if he could throw on this defendant the charge of repairing the hedge, and consequently, he was interested in the event of the suit.

* *Amcombe v. Shore*, 1 Taunt. R. 261.

A custom that every inhabitant within any ancient messuage in an ancient vill^a, by reason of his commorancy therein, has had common in the place in question, is bad; for inhabitants, unless they are incorporated, cannot prescribe to have profit in another's soil, but only in matters of easement, as in a way to a church, or in matters of discharge, as to be discharged of toll or of tithes.

But although *inhabitants*, on account of the vagueness of the description, cannot claim a right in *alieno solo*, yet the occupiers of houses or land may, by custom, claim such right. Adm. per cur. in *Bean v. Bloom*, 2 Bl. R. 928.

If issue be joined on a plea prescribing for a right of common generally^a, and the jury find that the party prescribing has a right of common, paying one penny for it; this finding will not support the plea; for the prescription is entire, and the payment of one penny annually is parcel of the prescription, and it shall be intended to be as ancient as the common.

So if a right of common be claimed in certain land^b, and it is found that the common has been released in part of the land, such finding will not support the right claimed.

So where the prescription is for common for all commonable cattle^c, evidence of a right of common for sheep and horses will not maintain the issue; but if the party has a general common, and prescribes for common for any particular sort of cattle, this will be good^d. So where the prescription was for common for 100 sheep, and it appeared in evidence, that the party was entitled to common for 100 sheep and 6 cows, it was holden to be good^e. See also *Fountain v. Cook*, post. tit. Trespass, Right of Way, S. P. (26).

Where a prescriptive right of common is pleaded^f, and issue is joined on the prescription, and there is a verdict in favour of the right, the want of averring that the plaintiff's cattle were in that part of the land in which the common is

^a *Smith v. Gatewood*, Cro. Jac. 152.
6 Rep. 59. b.

^a *Lovelace v. Reignolds*, Cro. Eliz.
603.

^b *Rotherham v. Green*, Cro. Eliz. 598.

^c *Pring v. Henley*, per Ward C. B.
Bull. N. P. 59. See also *Rogers v.*
Allen, ante p. 744.

^d Adm. S. C.

^e *Bushwood v. Bond*, Cro. Eliz. 722.

^f *Stennel v. Hog*, 1 Saund. 225.

(26) But it was said by Walmesley, if the jury had found that he had common for 120 sheep, and so more of the same kind than he had alleged, he had failed.

claimed, or that the cattle were levant and couchant upon the land of the plaintiff, is aided by the statutes of jeofail.

Tender of Amends.—Tender of amends *before* the taking of a distress makes the distress unlawful, and in such case an action of trespass may be maintained for taking the cattle^g.

Tender of amends *after* distress, and before impounding, makes the *detainer* unlawful, and gives the plaintiff a right of action for detaining his cattle.

The stat. 21 Jac. 1. c. 16. s. 5. by which it is enacted, "that in all actions of trespass *quare clausum fregit*, wherein the defendants shall disclaim in their plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence, or involuntary, the defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before action brought," is confined to actions of trespass, and does not extend to replevin^h.

Avowry, &c. for Rent Arrear.—At the common law, it was necessary for a termor in an avowry for rent due from his tenant, to shew out of what estate, and in what manner the term was derived, because particular estates being created by agreement of the parties out of the primitive estate, it was the office of the court to judge, whether the primitive estate and agreement were sufficient to produce the particular estateⁱ.

To obviate the difficulties which the avowant for rent arrear had to encounter in setting forth long and intricate titles, it was enacted by stat. 11 Geo. 2. c. 19. s. 22. that defendants in replevin might avow or make cognisance *generally*, that the plaintiff in replevin, or other tenant of the lands, whereon the distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then and still remains due; or that the place, where the distress was taken, was parcel of such certain tenements holden of such honour, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for, was at the time of such distress, and still remains due (27).

^g 2 Inst. 107.

^h Allen v. Bayley, Lutw. 15. 6.

ⁱ Scilly v. Dally, Salk. 562. Carth. 445. Lord Raym. 331. S. C. Reynolds v. Thorpe, Str. 796.

(27) *Nil habuit in tenementis* cannot be pleaded in bar to an avowry for rent arrear under this statute. *Sullivan v. Stradling*, 2 Wils. 208.

This statute does not extend to a rent charge^k.

Evidence that plaintiff held under an agreement for a lease, (where rent has not been paid) will not support an avowry or cognisance under this statute, viz. that plaintiff held by virtue of a demise; for there is not any demise either express or implied^l.

The sum stated in the avowry or cognisance to be due for rent is not material; for if it appears that less rent is due than defendant has avowed or made cognisance for, yet is he entitled to recover for so much as is due^m.

Where the avowry is for parcel of a rentⁿ, or penalty^o only, it ought to shew that the residue has been satisfied or discharged, otherwise it will be bad on demurrer^p.

If the defendant avow for so much rent arrear^q, part whereof is not due at the time of the distress, and enters judgment for the whole, it will be error; but it may be cured before judgment, by abating the avowry as to the part not as yet due (28).

Money may be paid into court on an avowry for rent arrear^r.

A rent is granted to A. for a term of years, with a clause in the deed, that A. and his heirs may distrain for the rent during the term: A. dies; the executor shall have the rent and distrain for it, and not the heir^s.

One joint tenant may distrain for the whole rent^t, but he ought to avow for part only in his own right, and for the residue he ought to make cognisance as bailiff to his companion.

Parceners must join in an avowry for rent arrear^u.

A. and B. were tenants in common in fee of land^x; A. granted a lease for years of his moiety to C. reserving a rent; C. assigned the lease to B.; it was holden, that A. might distrain upon B. for rent arrear, and avow for taking the distress in any part of the land.

k *Balpit v. Clarke*, 11 Bos. & Pul. N. R. 56.

l *Hegan v. Johnson*, 2 Taunt. 148.

m Said by Lord Ellenborough C. J. in *Forty v. Imber*, 6 East, 437. to be the constant practice.

n *Hunt v. Braines*, 4 Mod. 402.

o *Holt v. Sambach*, Cro. Car. 104.

p *Johnson v. Baines*, 12 Mod. 84.

q *Richards v. Cornforth*, Salk. 589.

r *Vernon v. Wynne*, 1 H. Bl. 24.

s *Darrel v. Wilson*, Cro. Eliz. 644.

t 5 Mod. 73. 12 Mod. 96.

u *Stedman v. Bates*, Ld. Raym. 641.

x *Snelgar v. Henston*, Cro. Jac. 611.

(28) See 1 Williams's Saunders, 285. n. 6. 8. and Harrison v. Barnby, 5 T. R. 248.

An avowry, justifying the taking a distress for rent arrear for a ready-furnished lodging, is good; it having been holden, that a landlord is entitled to distrain for the rent of ready-furnished lodgings.¹

Pleas in bar. Ejection.—To an avowry for rent arrear, the plaintiff may plead in bar an eviction or expulsion; for that occasions a suspension of the rent. But care must be taken, that an absolute eviction is stated in the plea, or at least such facts as amount in law to an eviction; for where, to an avowry for rent arrear for a dwelling-house², the plaintiff pleaded, that the defendant pulled down a summer-house, part of the premises, whereby the plaintiff was deprived of the use thereof; it was holden, that the plea was insufficient, because it stated merely a trespass, and not an eviction.

Non dimisit. Non tenuit.—The most usual pleas in bar to an avowry for rent arrear are, 1. Non dimisit, that is, that the avowant did not demise; 2. Non tenuit modo et forma, or that the plaintiff did not hold the land in manner and form, &c.

When issue is joined on the non tenuit modo et forma, the defendant is not holden to strict proof as to the identical time during which he alleges the tenant to have holden and enjoyed the land, &c. demised.

Hence, where the defendant made cognisance for two years and a quarter's rent in arrear³, and alleged, that for a long time, to wit, for two years and a quarter, ending on the 25th December, 1803, the plaintiff held and enjoyed the property demised, to which the plaintiff pleaded *non tenuit modo et forma*, and issue was joined thereon; proof that the plaintiff held and enjoyed from the 23d of December, 1801, was adjudged sufficient to entitle defendant to a verdict for two years' rent.

Riens in Arrear.—Riens in arrear, or no rent in arrear, may be pleaded in bar to this avowry; but such plea ought to conclude to the country; for where *de injuriâ suâ propriâ absque hoc quod redditus fuit in aretro* was pleaded to a cognisance for rent arrear; it was holden⁴ ill on special demurrer, as putting the defendant to an unnecessary replication.

A general plea of *de injuriâ suâ propriâ absque tali causâ*

¹ Newman v. Anderson, 9 Bos. & Pal. 434. ² Forty v. Imber, 6 East, 434.

N. R. 224.

³ Horn v. Lewis, Salk. 452.

⁴ Hunt v. Cope, Cowp. 242.

to an avowry or cognisance for rent arrear will be bad, on special demurrer; for this general plea can be pleaded only where the defendant's plea rests merely upon matter of excuse, and not upon any matter of interest or authority, mediately or immediately derived from the plaintiff, or any commandment⁴.

Tender of Arrears.—The same rule holds in this case as in the case of tender of amends for damage feasant; for if the tenant, before distress, tender on the land the arrears of rent, the taking of the distress becomes wrongful, and the tenant may maintain trespass for the caption; but if the distress has been made, and before impounding the arrears are tendered, then the *detainer* only is unlawful, and the tenant must bring detinue.

4. Property.

The defendant may plead property in himself, in bar of the action⁵, and this plea may conclude with a prayer for a return and damages⁶.

So property in a stranger may be pleaded in bar⁷, and the conclusion of this plea, praying a return, is good¹.

So it is a good plea to say, that the property is to the plaintiff and to a stranger; and where there are two plaintiffs, that the property is to one of them².

5. Statutes :

1. Of Limitations.

2. Of Set-off.

1. *Stat. of Limitations.*—By stat. 32 H. 8. c. 2. s. 3. "No person shall make any avowry or cognisance for any rent, suit, or service, and allege any seisin of any rent, &c. in the same avowry or cognisance in the possession of his ancestor, or in his own possession, or in the possession of any other, whose estate he shall pretend or claim to have above fifty years next before making the avowry or cognisance."

c *Johnson v. Kitchin*, 1 Bos. & Pal. 76.

d *Crogate's case*, 8 Rep. 66. b. Doct. pl.

114, 115.

e 2 Inst. 107.

f *Wildman v. Norton*, 1 Ventr. 349.

g *Pregrave v. Saundert*, 1 Salt. 5.

h *Butcher v. Porter*, Carth. 243.

i *Parker v. Mellor*, 1d. Raym. 21.

and Carth. 390.

k 1 Inst. 145. b.

This statute extends to such cases only¹, where the avowant was compelled to allege a seisin by force of some ancient statute of limitations, and consequently it does not render an allegation of seisin within the limited time necessary in those cases, where seisin was not required to be alleged before the statute, as in the case of a reservation or grant of a rent, where the title is founded on the deed.

Fealty, homage, and such casual services, are not within this statute².

By stat. 21 Jac. 1. c. 16. s. 3. actions of replevin shall be commenced and sued within six years after the cause of action. Hence *actio non accrevit infra sex annos* is a good plea in bar in replevin.

2. *Set-off*.—Avowry for rent arrear [*plea, riens in arrear*] and *issue thereon*. Plaintiff had given a notice of set-off³, and offered to support it by evidence at the trial; but Denison J. rejected it. The court of C. B. were of opinion, that the evidence was properly rejected, observing, that this case was neither within the letter nor the intention of the statute. The issue was special, and not general. It was not an action upon a personal contract. The rent savoured of the realty, and the remedy was by distress; replevin, they added, was a mixed action. The judgment, if for the avowant, must be for a return of the cattle. To take the benefit of the statute⁴, plaintiff and defendant must plead properly. In debt on bond, defendant cannot set off under *non est factum* or *solvit ad diem*, but must plead specially. *Perhaps by way of special plea to the avowry, plaintiff might have pleaded a mutual debt of more than the rent*. There could not have been a set-off by defendants under *non cepit*, nor could there be for plaintiff under *riens in arrear*.

To an avowry for rent arrear⁵, the tenant pleaded that a certain sum (equal in amount to the rent arrear) was due for ground rent from the avowant to the original landlord; that payment of that sum was demanded of the avowant, who refused to pay the same, whereupon the original landlord demanded payment of the tenant, and threatened to distrain, and that tenant, in order to avoid a distress, paid the ground rent: on demurrer, the plea was holden to be good; Buller J. observing, that there was a difference be-

¹ Foster's case, 6 Rep. 64. b.

² Bennett v. King, 3 Lev. 21.

³ Abelson v. Knight, Barnes, 450.
4to. ed. Bull. N. P. 181. S. C.

⁴ 2 G. 2. c. 22. s. 13.

⁵ Sapsford v. Fletcher, 4 T. R. 511.

tween a payment and a set-off; the former might be pleaded to an avowry, though the latter could not.

IX. Of the Judgment :

1. For the Plaintiff.

2. For the Defendant.

1. *For the Plaintiff.*—As by the nature of the proceedings in replevin the goods distrained are delivered by the sheriff to the plaintiff; if he recovers, he can have judgment for damages only.

If the plaintiff has judgment on a demurrer, the form of entry is, “that the plaintiff do recover his damages, by reason of the premises¹,” whereupon a writ of inquiry is awarded to ascertain the damages, and on return of the inquisition, final judgment is entered for the damages found by the inquisition, and costs *de incremento*.

If the plaintiff obtains a verdict, then the jury on that verdict ascertains the damages and costs, and the judgment is, “that the plaintiff do recover against the defendant the damages assessed by the jurors, and costs *de incremento*.”

2. *For the Defendant.*—At the common law, when the merits of a suit in replevin were decided by a verdict for the defendant, or judgment for him on demurrer, or confession by the plaintiff, the judgment for the defendant awarded him a return of the distress irreplevisable. A different rule obtained in the case of a nonsuit, for in that case the defendant was not entitled to this judgment. To remedy the inconvenience which proceeded from the plaintiff, in the case of nonsuits, having several replevins for one and the same cause, it was enacted, by stat. 13 Edw. 1. c. 2. that as soon as the return of the beasts should be adjudged to the distrainor, the sheriff should be commanded by a judicial writ to return the beasts to the distrainor, in which writ is to be inserted a direction to the sheriff not to deliver the beasts without a writ making mention of the judgment given by the justices (29).

q 2d Book of Judgm. 203. r 2d Book of Judgm. 208.

(29) It appears from the words printed in italics, and those
G G 2

By this statute, if the plaintiff in replevin be once nonsuit, he cannot have a new replevin, but must sue out a writ according to the directions of the statute. The writ is termed a writ of second deliverance. It is a judicial writ, issuing out of the court of record in which the nonsuit was had (30).

The writ of second deliverance^a is a supersedeas in law to the sheriff to forbear to execute the writ *de retorno habendo* (31) obtained on the nonsuit of the plaintiff, if delivered to the sheriff before return is made.

If upon the writ of second deliverance, the party replevying makes default a second time for any other cause, the statute has provided, that the distress shall remain irreplevisable for ever.

In the case of a distress for rent arrear, the statute 17 Car. 2. c. 7. has prescribed to the defendant a mode of proceeding in the four following cases:

I. If the plaintiff shall be nonsuit, *before issue joined*, in any suit of replevin by plaint or writ lawfully removed:

The defendant must make a suggestion in nature of an avowry or cognisance for the rent arrear, whereupon the court, upon prayer of the defendant, will award a writ of inquiry touching the sum in arrear at the time of the distress, and the value of the distress. On the return of the inquisition, the defendant will have judgment to recover the rent arrear, if the distress amounts to the value of it; if not, then to recover the value of the distress, with full costs (32).

^a 2 Inst. 341.

which follow them in the statute, viz. "*quod fieri non poterit nisi per breve quod exeat de rotulis justic' coram quibus deducta fuerit loquela*," that the provisions of this statute are confined to those cases where the cause has been removed into the superior court, and the plaintiff has been nonsuited there. If this be the true construction, it will follow, that so long as the cause remains in the county court, the plaintiff may replevy the distress after nonsuit there, and return made *in infinitum*, as he might before this statute.

(30) See the form of this writ, Gilb. Repl. Cup. II. S. VII. 4.

(31) But not to the writ of inquiry of damages on stat. 21 H. 8. c. 19. Salk. 95. or on stat. 17 Car. 2. c. 7. Ventr. 64. 2 Wils. 117.

(32) For the form of prayer, writ of inquiry, and judgment, where the distress amounts to the value of the rent, see Lilly's

II. If the plaintiff shall be nonsuit, after cognisance or avowry made, and issue joined :

In this case the jurors that are impanelled to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum of the arrears and the value of the distress, and thereupon the defendant is entitled to the same judgment as in case I.

III. If, after cognisance or avowry made, and issue joined, the verdict shall be given against the plaintiff :

As in the last case, the jurors that are impanelled to inquire of such issue shall, at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the distress (33), and thereupon the defendant is entitled to the same judgment as in case I.

Entries, 3d edition, 1758, p. 610. For the form of the judgment where the distress is of less value than the rent, see Tidd's Practical Forms, 1st ed. p. 292. If the plaintiff be nonprossed after defendant has avowed, for want of a plea in bar, it seems unnecessary to add a suggestion, the cause of the distress being sufficiently ascertained by the avowry. See the form of the writ of inquiry in this case, in Tidd's Prac. Forms, 1st ed. p. 163, 164.

(33) It must be observed, that if the jurors give a defective verdict, *e. g.* if they find the value of the distress, but omit to find the sum of the arrears, this omission cannot be supplied by a writ of inquiry ; because the statute directs that the jurors, who are impanelled to try the issue, shall inquire concerning the sum of the arrears. *Sheape v. Culpepper*, 1 Lev. 255. The case of *Sheape v. Culpepper* was recognised by *Ld. Hardwicke C. J.* in *R. v. Kynaston*, B. R. T. 10 G. 2. MS. where it was holden, that the court could not supply a defective verdict, where several traverses had been taken on a return to a mandamus, under the statute 9 Ann. c. 20. and the jury had omitted to find damages and costs for the plaintiff. See also *Ca. Temp. Hardw.* 297. This point was again moved in *Freeman v. Lady Archer*, 2 Bl. 763.; and *Gould J.* then expressed a doubt, whether a writ of inquiry could be granted to supply a defective verdict for the defendant in the case of an avowry for rent arrear. It appears clearly, from the case of *Sheape v. Culpepper*, that it cannot. And in a more recent case, where the jury found a verdict for the avowant, and damages to the amount of the rent claimed in the avowry, but did not find either the amount of the rent in arrear, or the value of the distress, and judgment was entered for the damages assessed ; it was holden, that this judgment was erroneous, and could not be amended into a judgment under the statute, *because the neglect of such inquiry*

IV. If judgment be given upon *demurrer* for the avowant or person making cognisance:

In this case the court, at the prayer of the defendant, will award a writ to inquire of the value of the distress (34), and upon return thereof the like judgment shall be given as in case I., that is to say, to recover the rent alleged to be in arrear in the avowry or cognisance, if the distress shall amount to the value of it; if not, then to recover the value of the distress, with full costs (35).

*by the jury could not be in any manner supplied**. *Rees v. Morgan*, 3 T. R. 349. In cases where the court is not restrained by the express words of the stat. 17 Car. 2. c. 7. s. 2. (which relates to rent arrear only) an inquiry may be granted to supply omissions on the part of the jury at the trial of the replevin. Hence, where the defendant avowed, as overseer of the poor, for a distress for a rate under stat. 43 Eliz. c. 2. and at the trial the plaintiff was nonsuit, and the jury was discharged without any inquiry of the treble damages given by the 19th section of that statute to defendants in case of a nonsuit after appearance; an application was made to the court that the avowants might have a writ of inquiry awarded to supply this defect, which application, after much debate, was granted. *Herbert v. Walters*, *Ld. Raym.* 59. *Salk.* 205. *Carth.* 362. *S. C.*

A similar application was made in the case of *Valentine v. Fawcett*, 2 Str. 1021. *Ca. Temp. Hardw.* 138. where a *verdict* had been given for the defendant, who had avowed under the same statute 43 Eliz. c. 2. *Ld. Hardwicke C. J.* (with whom the rest of the court concurred) was of opinion, that a writ of inquiry ought to be granted, upon the ground, that the words of this section of the statute were sufficient to take in this case, viz. "that defendant shall recover treble damages, to be assessed by the same jury, or writ to inquire of the damages, as the same shall require." The case of *Valentine v. Fawcett* was recognised in *Dewell v. Marshall*, 2 Bl. R. 921. and 3 Wils. 442. in which the court awarded a supplemental writ of inquiry, after verdict found for the defendant, who had avowed under the statute 43 Eliz. c. 2.

(34) The amount of the rent alleged to be due in the avowry or cognisance being admitted by the demurrer, it is not necessary in this case, as it is in the three preceding cases, that the inquiry should extend to the amount of the rent in arrear.

(35) See the form of a judgment on demurrer for an avowant, prayer of writ of inquiry, award thereof, writ, return of the value

* But the court in this case permitted the defendant to amend his judgment by entering a common law judgment.

That there may not be any failure of justice, the fourth and last section of the statute directs, that in all the preceding cases where the value of the cattle (36) distrained shall not be found to the full value of the arrears, the party to whom such arrears are due, his executors or administrators, may, from time to time, distrain again for the residue.

It is worthy of remark, that this statute, which defines with so much accuracy the mode of proceeding to be adopted by a defendant, who succeeds in a replevin suit, has not superseded the judgment at common law, which may still be entered, if the defendant shall be so advised; for the statute is considered as giving a farther remedy, and not as extinguishing the remedy to which the defendant was entitled at common law. Under this view of the statute, it has been holden^t, that an avowant may enter a common law judgment, and also pray a writ of inquiry under the statute. It ought, however, to be observed, that the remedy provided by the statute is attended with this advantage, that the writ of inquiry awarded under it may be executed, notwithstanding the plaintiff has sued out a writ of second deliverance^a (37); whereas the writ of second deliverance, if delivered to the sheriff before return made, operates as a supersedeas to the writ of *retorno habendo* issuing on the common law judgment^u.

X. Of the Costs, and herein of the Costs in Error.

1. *As to the Plaintiff.*—AT the common law, the plaintiff obtaining judgment in replevin was not entitled to costs^v; but

^t Baker v. Lade, Carth. 254.
^u Cooper v. Sherbrook, 2 Wils. 116.

^x 2 Inst. 341. & S. P. per Holt C. J. in
Pratt v. Ruttleis, 12 Mod. 547.
^y Tidd's Pr. 863. ed. 2d.

of the distress, amounting to less than the rent alleged to be due, and final judgment thereupon, in Mounson v. Redshaw, 1 Saund. 195.

(36) The preceding clauses of this statute mention *goods* and cattle distrained, but this speaks of cattle only. The omission of the word "*goods*" in this clause appears to be casual.

(37) The same rule holds with respect to the writ of inquiry of damages under the 21 H. 8. c. 19. which may be executed after a

now, by the stat. of Gloucester, 6 Ed.1. c. 1. s. 2. the plaintiff is entitled to costs in all cases where he was entitled to damages antecedently to the statute of Gloucester; of course, therefore, the plaintiff is entitled to costs in replevin.

2. *As to the Defendant.*—At the common law, if an avowry, or cognisance, or justification, was found for the defendant in replevin, or if the plaintiff was otherwise barred, the defendant was not entitled to costs; but now, by stat. 7 H. 8. c. 4. s. 3., “persons making avowry, cognisance, or justification in replevin, or second deliverance for any *rent, custom, or service*, if their avowry, &c. be found for them, or if the plaintiff be otherwise barred, shall recover their damages or costs, as the plaintiff should have done if he had recovered.”

And by stat. 21 H. 8. c. 10. (which permits avowries, &c. in replevin and second deliverance to be made by the lord, &c. alleging the land to be holden of him without naming the tenant,) damages and costs are given to defendants in replevin, not only in the cases provided for by the preceding stat. of 7 H. 8. c. 4., but also in the cases of avowries, &c. for damage feasant, or for other rents, if such avowries, &c. be found for them, or if the plaintiff be otherwise barred.

Upon a distress for an heriot, the defendant will be entitled to costs, but not upon a distress for an amerciament, because the statute extends only to customs and services^a.

A replevin is not within the meaning of the statute 8 & 9 W. 3. c. 11. s. 1.^a which gives costs to persons who are improperly made defendants in actions or complaints of trespass, assault, false imprisonment, or *ejeotio firmæ*.

Costs in Error.—By stat. 3 H. 7. c. 10., reciting that writs of error were often brought for delay, it is enacted, “That if any *defendant or tenant*, against whom judgment is given, sue any writ of error to reverse it, in delay of execution, if judgment be affirmed, &c., the person against whom the writ of error is sued shall recover his *costs and damages* for the delay and vexation.”

This statute applies only to cases where the judgment below is for the *plaintiff*; and subsequent statutes, viz. 3 Jac.

^a Porter v. Gray, Cro. Eliz. 300.

^a Ingle v. Wordsworth, 3 Burr. 1285.

writ of second deliverance has been served. Pratt v. Rutledge, Salk. 95.

1. c. 8. and 16 & 17 Car. 2. c. 8., have not extended the description of persons to whom relief was meant to be given by the stat. 3 H. 7. c. 10.

Hence, where in replevin in C. B.^b, the defendant made cognisance for rent in arrear, and had a verdict and judgment pursuant to the stat. 17 Car. 2. c. 7., which judgment was affirmed in B. R. on a writ of error brought by the plaintiff. On application to the court of B. R., that the defendant in error might be allowed interest on the sum recovered by the judgment below, by force of the stat. 3 H. 7. c. 10., the court refused to grant relief, observing, that the case of *Cone v. Bowles*, 4 Mod. 7, 8., had settled the question, that an avowant in replevin, for whom judgment below was given, which was afterwards affirmed in error, was not within the statute.

By stat. 8 & 9 W. 3. c. 11. s. 2., "Costs in error are given to the defendant where the judgment below is for him and is affirmed on error."

This statute applies only to those cases^c where judgment is given on *demurrer* for defendants below; consequently, where an avowant in replevin for rent arrear had a *verdict* and judgment below, which judgment was afterwards affirmed on error, it was holden that such defendant was not entitled to his costs under the preceding statute.

^b *Golding v. Dias*, 10 East, 2.

^c *Golding v. Dias*, 10 East, 4.

C H A P. XXXIV.

RESCOUS.

THE term rescous, as far as relates to the subject of this chapter (1), means the setting at liberty, against law, a person arrested by process or course of law^a.

To recover a compensation for this injury the plaintiff may bring an action of rescous, or an action on the case, against the party guilty of the rescous. The action of rescous having fallen into disuse, the usual mode of proceeding is by an action on the case, to support which, it is necessary for the plaintiff to prove,

1. The original cause of action.

2. The writ and warrant, by the production of copies of them, sworn to be true copies by a witness who has compared and examined them with the originals.

3. The manner of the arrest, in order that it may appear to the court whether the arrest was legal or not; for without a legal arrest there cannot be a rescue.

Mere words only, as if the officer says to a defendant, "that he has a warrant against him, and that he arrests him," will not constitute an arrest^b, if the defendant afterwards escapes from the officer; but if the defendant acquiesces, and goes along with the officer, this will be considered as submitting himself to the process, and as complete an arrest as if the officer had touched the person of the defendant^c.

An officer having two warrants in *his pocket* against the defendant^d, at the several suits of A. and B., laid his hands on the defendant, and said to him, "I arrest you by virtue of a warrant that I have;" but he did not shew the defendant the warrant, *nor had it in his hand*, nor told the defen-

^a 1 Inst. 160. b.

^b Genser v. Sparks, Salk. 79.

^c *Hermer v. Battyn*, B. R. H. 12 Geo.

2. Bull. N. P. 62.

^d *Hodges v. Marks*, Cro. Jac. 485.

(1) For rescous of distresses, see ante, tit. Distress, sect. VIII.

dant at whose suit he arrested him, neither did the defendant demand to see the warrant, or to be informed at whose suit he was arrested. It was holden, 1st, that this arrest, without shewing the warrant, and without mentioning at whose suit the defendant was arrested, was legal, and that it was not incumbent on the officer to shew the warrant to the defendant, until he obeyed and demanded it. 2dly, That this arrest was legal, although the officer had not the warrant in his hand, and although he had two warrants in his pocket for the defendant; for, being under the bailiff's arrest, he was in custody for all causes for which the sheriff had made his warrant against him, although the sheriff or bailiff did not mention any specially.

By stat. 29 Car. 2. c. 7. s. 6. "No person upon the Lord's day shall serve or execute any writ, process, warrant, order, judgment, or decree, (except in cases of felony or breach of the peace) but the service of every such writ, &c. shall be void to all intents and purposes."

As it is matter of public policy*, that proceedings of the nature described in the statute should not be executed on a Sunday, the regularity or irregularity of them cannot depend on the assent of the party afterwards to waive an objection to such proceedings, because they are in themselves absolutely void by the statute.

In the construction of this statute^f, it has been holden, that an arrest cannot be made on a Sunday for non-payment of a penalty by a defendant who has been convicted on a penal statute.

The statute prohibits original arrests only on Sundays.

Hence a defendant, who wrongfully escapes from the custody of the law, may be retaken upon a Sunday, on fresh pursuit^g, or by virtue of an escape warrant^h, which is in the nature of fresh pursuit, for it is not original process, and a commitment upon it is only the old commitment continued down.

But after a voluntary escape, defendant cannot be retaken on a Sundayⁱ.

So where A. was arrested at the suit of B., and discharged, the sheriff not knowing that there was also a detainer in his office against A. at the suit of C. and on the Sunday following the sheriff arrested A. at the suit of C., the court dis-

e Taylor v. Phillips, 3 East, 155.

f R. v. Myers, 1 T. R. 265.

g Admitted in Parker v. Moor, Salk.

696.

h Adjudged in Parker v. Moor, Ld.

Raym. 1092. Salk. 696. 6 Mod. 98.

i Featherstonehaugh v. Atkinson, Barnes, 373.

charged him out of custody, considering the arrest on the Sunday, either as an original taking, which was prohibited by the statute, or as a retaking after a voluntary escape, which was bad under the authority of the preceding case^k, where the distinction between a voluntary and a negligent escape was recognised.

A person may be arrested on a Sunday on an attachment for a rescue^l. But a rule nisi for an attachment for non-payment of a sum of money, pursuant to the master's allocatur, cannot be served on a Sunday^m.

If a defendantⁿ, after an arrest on mesne process, is rescued *as he is conducting to gaol*, the only remedy which the plaintiff has, is by an action against the rescuers, since the sheriff is excusable by reason of the rescue; for on mesne process the sheriff is not bound to take the posse comitatus with him, and therefore upon such process it is a good return to return the rescous (2). In an action against the sheriff for an escape on mesne process, if he pleads a rescue, it is not incumbent on him to shew that the rescue was returned^o.

4. The plaintiff must prove the damage sustained by the rescue, viz. the loss of the debt by reason of the escape of the defendant (3).

k Atkinson v. Jameson, 5 T. R. 25.

l Willes, 459.

m M^cleham v. Smith, 8 T. R. 96.

n May v. Proby, Cro. Jac. 419.

o Gorges v. Gore, 3 Lev. 46.

(2) If the party is once within the walls of the prison*, though the custody is on mesne process only, yet a rescue thence by any persons (except the king's enemies†) will not excuse the sheriff. So on writs of execution the sheriff cannot return a rescue: for the law supposes that the sheriff is attended with his posse comitatus‡. So if the defendant is brought out of prison after judgment, and before any charge in execution, on a habeas corpus, and is rescued on the way to the judge's chambers, the sheriff will be answerable in an action for an escape; for it is his duty, and so he is directed by the writ to provide for the sure and safe conduct of the party§.

(3) With respect to damages, Holt C. J. in *Wilson v. Gary*, 6 Mod. 211. said, that the offenders were not entitled to any favour, because they were guilty of a violence against the process of the law, and therefore this case was not to be compared to the case of a negligent escape.

* May v. Proby, 1 Roll. Rep. 441. resolved per tot. cur. recognised in 1 Str. 435.

† Per Coke in his report of Southcote's case, 4 Co. 84. a.

‡ May v. Proby, 1 Rol. Rep. 441. Resolved per tot. cur.

§ Crompton v. Ward, Str. 429.

CHAP. XXXV.

SLANDER.

- I. *Scandalum Magnatum.*
 - II. *Of the Action for Slander, and in what Cases it may be maintained.*
 - III. *Of the Declaration, and herein of the Nature and Office of the Innuendo.*
 - IV. *Of the Pleadings—Evidence—Costs.*
-

I. *Scandalum Magnatum.*

SLANDER spoken and published of a peer is termed scandalum magnatum.

The stat. Westm. 1. c. 34. commands, “that none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his people, or the great men of the realm, and he that doth so, shall be taken and kept in prison, until he hath brought *him* into the court *which was the first author of the tale* (1).”

And by stat. 2 R. 2. c. 5. “None shall devise or speak false news, lies, or other such false things of the prelates, dukes, earls, barons, and other nobles and great men of the realm, and of the chancellor, treasurer, clerk of the privy seal, steward of the king’s house, justices of the one bench or the other, and other great officers of the realm, and he that doth shall incur the pain of the stat. Westm. 1. c. 34.”

(1) See Sir Edw. Coke’s exposition of this statute, 2 Inst. 225.

And by stat. 12 R. 2. c. 11. "When any such [person, as is described in the foregoing statutes,] is taken and imprisoned, and cannot find him by whom the speech be moved, he may be punished by the advice of the council, notwithstanding the statutes of Westm. 1. c. 34. and 2-R. 2. c. 5."

The foregoing statutes do not expressly give an action, yet it has been holden, that the party injured may maintain an action on the stat. of 2 R. 2. c. 5. upon the principle of law^a, that an action lies on a statute, which prohibits the doing an act to the prejudice of another. Though the dignity of viscount was not created at the time when this statute was made, yet it has been holden, that such dignity is within the statute^b; and a peer of Scotland, since the union, may also take advantage of this statute^c (2).

The form of declaration is, *tam pro domino rege quam pro seipso* (3), concluding *contra formam statuti*^d. The stat. 2 R. 2. c. 5. is a general law^e, and consequently need not be pleaded^f; but if the party undertake to recite it, and fail in a material point, it will be fatal^g. It must appear on the face of the declaration, that the party injured was *unus magnatum* at the time when the words were spoken^h. Special bail is not required in this actionⁱ, and the venue cannot be changed upon the common affidavit^k. Neither can a writ of error be brought upon it in the Exchequer Chamber^l, for it has been holden, that this action is not an

^a 2 Inst. 118. 10 Rep. 75. b.

^b Visc. Say and Seale v. Stephens, Cro. Car. 185.

^c Visc. Falkland v. Phipps, Comyn's R. 439.

^d Vid. Entr. 74.

^e Doct. Plac. 339. 4 Rep. 12. a.

^f Ld. Shaftesbury v. Ld. Digby, 2 Mod. 98.

^g 4 Rep. 12. b. for instances of mis-recital, what fatal, and what not, see 1 Com. Dig. 188. (B) 3.

^h Adm. Cro. Jac. 136.

ⁱ 19 Mod. 420. 2 Mod. 215. S. P.

^k Duke of Norfolk v. Alderton, Carth. 400. D. of Richmond v. Costelow, 11 Mod. 234. 2 Salk. 668. 1 Lev. 56. 1 Bac. Abr. 36.

^l Ld. Say and Seal v. Stephens, Cro. Car. 142. Ley, 82. S. C. Sir W. Jones, 194. S. C.

(2) Some of the old precedents state the plaintiff to have *vocem at locum in parlamento*. See Vid. Ent. 74. and Bohun, 319, 320.; but these words are unnecessary, and they are omitted in one precedent in Herne, 200. Vid. 61. and in another in Herne, 201. Vid. 63.

(3) An action upon a statute which prohibits a thing, but does not give any penalty, must be brought *tam pro rege quam pro seipso*, because in such case the king is to have a fine. Waterhouse v. Bawd, Cro. Jac. 134. See the precedents cited in n. (2).

action on the case within the meaning of the stat. 27 Eliz. c. 8. which gives the writ of error in Exchequer Chamber in certain actions.

There is a dictum in 2 Show. 506. that in a scend. mag. the plaintiff obtaining a verdict will not be entitled to costs.

It has been holden, that certain words are actionable in the case of a peer, which would not have been deemed so in the case of a common person; as in *Ld. Townshend v. Hughes*^m, where the defendant said of the plaintiff, "he is an unworthy man, and acts against law and reason."

II. *Of the Action for Slander, and in what Cases it may be maintained.*

In former times, the action for slander was very rare; the first action for words to be found in the books was in the 30th year of Edw. 3. Lib. Ass. fo. 177. pl. 19. and from that time to the reign of Queen Elizabeth, these actions were few in number, and not brought on frivolous causes. During the reign of Queen Elizabeth and King James, they began to increase, and in modern times the action has been more frequent.

Actions for words should not be brought upon slight and trivial occasions; and where the words are merely words of heat, anger, or passion, spoken suddenly or without deliberation, such actions should be discountenanced; at the same time, it has been truly said (by Wray C. J.) that unless the party injured by false and malicious scandal had a remedy at law, it would be *a verbis ad verbera*, and the consequences might be fatal.

It would exceed the limits prescribed to this work to enumerate with particularity all the cases which have been adjudged, as to what words are actionable, and what are not so. It may be sufficient for the present purpose to observe, that,

An action on the case lies against any person for falsely and maliciously speaking and publishing of another's words

^m 1 Mod. 532. 2 Mod. 150 S. C.

which directly (4) charge him with any crime, for the commission of which the offender is punishable by law^a (5), as treason^b, murder^c, larceny^d, perjury^e, keeping a bawdy-house^f, or with *having* (6) any contagious disorder, the imputation of which may exclude him from society, as leprosy^g, plague, French pox^h, &c.

In order to sustain this action, it is essentially necessary that the words should contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor. An imputation of the mere defect or want of moral virtue, moral duties, or obligations, is not sufficientⁱ. To call a man a swindler, is not actionable^j; so to call a man a thief is not actionable, unless it be intended to impute felony to him. Hence, where that expression is accompanied with other words, which clearly denote that the speaker did not intend to impute felony to the party charged, no action can be maintained.

In an action for words, the words proved were^k, "He is a thief, for he has stolen my beer." It appeared in evidence, that the defendant was a brewer, and that the plain-

^a Finch, B. 3. C. 2.

^b Lewis v. Roberts, Hard. 303.

^c 1 Roll. Abr. 79. pl. 4.

^d Aleyn, 31.

^e 1 Roll. Abr. 39. l. 25.

^f 1 Roll. Abr. 44. l. 15.

^g Taylor v. Perkins, Cro. Jac. 144.

^h 1 Roll. Abr. 66. l. 33.

ⁱ Per de Grey C. J. delivering judgment in Onslow v. Horne, 3 Wils. 177. recognised by Lawrence J. in Holt v. Scholefield, 6 T. R. 694.

^j Savile v. Jardine, 2 H. Bl. 531.

^k Christie v. Cowell, Peake N.P.C. 4.

(4) "Words to be actionable must be unequivocally so. Imputing to a person an evil inclination, which is not carried into effect, is not actionable." Per Ellenborough C. J. in Harrison v. Stratton, M. T. 1803. 4 Esp. N. P. C. 218.

The charging another with a crime of which he cannot by any possibility be guilty, as killing a person who is then living, is not actionable, because the plaintiff cannot be in any jeopardy from such a charge. Snag v. Gee, 4 Rep. 16. a.

(5) That is, by common law or statute; for charging a man with an offence examinable only in the spiritual court, unless special damage ensues, is not actionable. Parrat v. Carpenter, Cro. Eliz. 502. Graves v. Blanchet, Salk. 696.

(6) But charging a person with *having had* a contagious disorder, is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the ground of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society. Per Ashhurst J. in Carlake v. Mapledoram, 2 T. R. 475. 2 Str. 1189. S. P.

the plaintiff had lived with him as servant; in the course of which service he had sold beer to different customers of the defendant, and received money for the same, which he had not duly accounted for. Ld. Kenyon C.J. directed the jury to consider whether these words were spoken in reference to the money received, and unaccounted for, by the plaintiff, or whether the defendant meant that the plaintiff had actually stolen beer; for if they referred to the money not accounted for, that being a mere breach of contract, so far explained the word "thief" as to make it not actionable. Thus if a man says to another "you are a thief, for you stole my tree," it is not actionable, for it shews he had a trespass and not a felony in his contemplation. V. for defendant. See also *Thompson v. Bernard*, 1 Camp. N. P. C. 48. to the same effect.

The rule which at one time prevailed^b, that words are to be understood *in mitiori sensu*, has been long ago superseded, and words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them.

In an action for words, it was stated in the declaration^c, that the plaintiff had lived among his neighbours with credit and reputation, and without being suspected of felony, and that the defendant, in order to charge him with the crime of felony, falsely and maliciously spoke of the plaintiff these false, malicious, and scandalous words, viz. "that the plaintiff was in Winchester gaol, and was tried for his life, and would have been hanged, if it had not been for Abraham Legat, for breaking farmer Atkin's granary and stealing his sacks." Plea N. G. After verdict for plaintiff, it was moved in arrest of judgment, that the words did not import any guilt in the plaintiff, being only a narrative of what passed on the trial, and rather tended to shew the plaintiff was cleared by the evidence of Legat, than that he was guilty of any crimes for which he deserved to be hanged. But per Ld. Hardwicke C. J. "The construction now made upon actions for words is very different from what it was formerly. Judges anciently, to discourage little frivolous actions, used their utmost endeavour to explain away the most opprobrious words: but this was certainly wrong, and as the character and reputation of mankind is under the protection of the law, as well as their estates, we ought to do

^a Cro. Jac. 114. Bull. N. P. 5.

^b 9 East, 96.

^c *Carpenter v. Tarrant*, M. T. 16 G. 2.
B. R. MSS. Ca. Temp. Hardw. 339.

S. C. cited by Ld. Ellenborough C. J. delivering the opinion of the court in *Roberts v. Camden*, 9 East, 97.

equal justice to both, and take care that neither the one or the other are injured. The question then is, whether the words spoken do import any slander or reproach, for which an action lies. To say a man has been in gaol and tried for his life, is certainly scandalous; and that he would have been hanged but for such a one, does naturally import, that he was saved by some indirect means. And he cited the case of *Hally v. Stanton*, Cro. Car. 268. as a very strong authority in point. As to the 2d question, whether the plaintiff ought not to have averred, that he was not in gaol, &c. it was anciently held, that such averments were necessary; but in later times, it has been holden, that the alleging the words to have been spoken falsely amounted to such an averment; and if so, the court must now take it, that all the imputation cast on the plaintiff was false. If the words had been true, the defendant should have pleaded that specially.

So where the defendant said of the plaintiff^d, that "he was under a charge of a prosecution for perjury, and that G. W., an attorney, had the attorney-general's directions to prosecute the plaintiff *for perjury*:" the defendant pleaded N.G. After verdict for plaintiff, it was objected, in arrest of judgment, that the words were not actionable, as not conveying any opinion of the speaker upon the truth of the charge. But the court overruled the objection; Ld. Ellenborough C. J. (who delivered judgment) observing, that the words must mean, that the plaintiff was ordered by the attorney-general to be prosecuted, either for a perjury which he had committed, or which he had not committed, or which he was supposed only to have committed. In the first sense they were clearly actionable. In the second, they could not possibly be understood consistently with the context. And if the defendant had used the words in the last sense, the jury might have acquitted him, according to the doctrine in the case of *Oldham v. Peake*, both in the Court of Common Pleas^e and in this court^f. And certainly, if the sense of the defendant, in speaking these words, had varied from that ascribed to them by the plaintiff, he might by specially pleading have shewn them not actionable, had he not chosen to have rested the defence merely on the general issue. It appeared, therefore, that these words must fairly be understood in the first of these three senses, namely, that he was ordered to be prosecuted for a perjury *which he*

^d *Roberts v. Camden*, 9 East, 93.
^e 2 Bl. 961, 2.

^f 1 Cowp. 378.

had committed; and, so understood, they were unquestionably actionable.

In addition to the preceding instances, it may be observed, that it is actionable, falsely and maliciously to speak and publish of another words which tend to disinherit him^g, or to deprive him of his estate^h, or which slander him in his officeⁱ, profession^j, or trade^k; *e. g.* in speaking of a justice of the peace in the execution of his office, to say that "he is a rascal, a villain, and a liar," is actionable; for the words import a charge of acting corruptly and partially^m.

For slander of this kind, an action may be brought before any injury has been sustained, in consequence of the words having been spoken. From the nature of the words, the law implies the injury; hence such words are said to be actionable in themselves.

In *Harwood v. Sir J. Astley*, in error, 1 Bos. and Pul. N. R. 47. it was contended, that an action could not be maintained, because the words were alleged to have been spoken of the plaintiff, (below) as a candidate to serve in Parliament; but it was holden, that the words being actionable in themselves (7), it was quite immaterial whether they were spoken of the plaintiff as a candidate or not.

If the plaintiff has sustained any special damage in consequence of words actionable in themselves having been spokenⁿ, and seeks to recover a compensation for it, such special damage must be stated in the declaration, with as much certainty as the subject matter is capable of, in order that the defendant may be sufficiently apprised of the nature of the case which is intended to be proved against him, and consequently be prepared to meet it.

By the stat. 21 Jac. 1. c. 16. s. 3. "Actions on the case for words must be commenced and sued within two years next after the words spoken." But by s. 7. "Infant, feme covert, non compos mentis, person imprisoned or beyond sea, may sue within two years after the removal of their respective disabilities."

g 1 Rol. Abr. 37. l. 27.

h *Bois v. Bois*, 1 Lev. 134.

i *How v. Prinn*, Salk. 694. *Ld. Raym.*

812. S. C.

k *Hardwick v. Chandler*, Str. 1138.

l *Upsheer v. Betts*, Cro. Jac. 579, 9.

m *Aston v. Blagrove*, Str. 617. *Ld. Raym.* 1369. S. C.

n *Geare v. Britton*, Bull. N. P. 7. *Hatheway v. Newman*, B. R. Midgl. Sittings, Feb. 17, 1804. S. P. per Lord Ellenborough C. J.

(7) The words charged the plaintiff (below) with having murdered his father.

Of Words not actionable in themselves.—Words not actionable in themselves may become so, by reason of some special damage arising from them, *e.g.* if a person say to a woman, “you are a whore,” whereby she loses her marriage^p, or a substantial benefit arising from the hospitality of friends^q. So if a person slander the title of another, whereby he is prevented from selling his estate; but in these cases, it is incumbent on the party injured, not only to state and prove the speaking of the words, but also the particular injury which he has sustained; because the words not being actionable in themselves, the special damage is considered as the gist of the action^r.

It must also appear^t, that the special damage was the *legal* and natural consequence of the words spoken; for an illegal consequence, viz. a tortious act, will not be sufficient.

Two persons cannot join in an action for slanderous words spoken of them^u, for the injury which the one sustains by the slander is not any injury done to the other. But if defamatory words be spoken of partners in trade^x, whereby they are injured in their trade, a joint action will lie at the suit of the partners, although the words be actionable of themselves.

It is actionable to republish any slander invented by another^y, unless the republication be accompanied by a disclosure of the author's name, and a precise statement of the author's words, so as to enable the party injured to maintain an action against the author. This disclosure and statement must be made *at the time* of republishing the slander; for it will not avail the defendant to make it for the first time in pleading to an action brought by the party injured.

From the preceding remarks it appears, that falsehood and malice, either express or implied, are of the essence of the action for slander and special damage, where the words are not actionable in themselves.

p 1 Rol. Abr. 35. l. 15.

q Moore v. Meagher, in error, Exch. Ch. 1 Taunton's R. 39.

r Lowe v. Harewood, Sir W. Jones, 190. Cro. Car. 140.

s Browne v. Gibbons, Salk. 206.

t Vicars v. Wilcocks, 8 East, 1.

u Dyer, 19. a. pl. 112.

x Cook and another v. Batchellor, 3 Bos. & Pul. 150.

y Davis v. Lewis, 7 T. R. 17. Maitland v. Goldney, 2 East, 426. These cases were recognised in Woolnoth v. Meadows, 5 East, 463.

III. Of the Declaration, and herein of the Nature and Office of the Innuendo.

IN the declaration, after such prefatory averments as the circumstances of the case may render necessary (8), it must be alleged expressly what words were spoken (9), and that they were spoken and *published* of the plaintiff^a falsely and maliciously.

If the words were spoken in a foreign language, it must be averred in the declaration, that the hearers understood such language^a.

Where the charge alleged against the plaintiff relates to his office, profession, or trade, there it ought to appear on the face of the declaration, that plaintiff was in office^b, or exercising his profession or trade^c at the time when the words were spoken, and that they were spoken in relation to his office, profession, or trade^d.

In an action for words spoken of a person who was a candidate to serve in parliament, it is not necessary to set forth the writ in the declaration^e. It is sufficient for the plaintiff to state that he was a candidate to serve in the (present) parliament, which cannot exist without a writ to call the parliament together.

In that part of the declaration which states the slander, the words ought to be explained in such manner as they

^z Johnson v. Aylmer, Cro. Jac. 126.

^a Price v. Jenkins, Cro. Eliz. 865.

^b Yelv. 158.

^c Collis v. Malin, Cro. Car. 282.

^d Todd v. Hastings, 2 Saund. 307. Savage v. Robery, Salk. 694.

^e Harwood v. Sir J. Astley, 1 Bos. & Pul. N. R. 47. on error, in Exch. Chr.

(8) By an ancient rule in the court of B. R. M. 1655, it is ordered, "that in actions of slander long preambles be forborn; and no more inducement than what is necessary for the maintenance of the action, except where it requires a special inducement or colloquium."

(9) "That the defendant spake of the plaintiff, *quædam falsa et scandalosa verba, quorum tenor sequitur in hæc verba, &c.*" was holden insufficient, because it was not an express allegation, that the defendant spake the same identical words. Garford v. Clerk, Cro. Eliz. 857.

may require. Whilst the pleadings were in Latin, this explanation was introduced by the word "*innuendo*:" e.g. "Thou (*eundem quer' innuendo*) art a thief;" which in a modern declaration would stand thus: "Thou, (*meaning the said plaintiff*) art a thief." The term *innuendo* is still retained, whenever this part of the declaration is mentioned. In the foregoing instance, it may be observed, that the *innuendo* is the same in effect as "that is to say." Its office is merely to explain and designate, that the person intended by the word "thou" is the plaintiff. But that the plaintiff was the person intended, must appear from the manner in which the words were spoken, which must be stated in the declaration, namely, that they were spoken of the plaintiff, or to the plaintiff, or in a conversation with the plaintiff, and not from the *innuendo* only^f; for if the person of whom the words were spoken be uncertain, an action will not lie; and a plaintiff cannot merely, by the force of an *innuendo*, apply the words to himself^g.

When the *innuendo* is annexed to the charge preferred against the plaintiff, then its office is to give to the words spoken their proper signification, but not to extend the sense of them beyond their natural import. Therefore, where a declaration stated that defendant said of the plaintiff, "he has forsworn himself, (*meaning that the plaintiff had committed wilful and corrupt perjury,*)" it was holden that the words not being actionable in themselves, because they did not necessarily imply that the plaintiff had forsworn himself, *in a judicial proceeding*, their meaning could not be extended by the *innuendo*^h. But if the defendant had spoken the words concerning some judicial proceeding that had before taken place, in which the plaintiff had given testimony, and these facts had been averred in the declaration, then such an *innuendo* would have been good; because the words, coupled with the preceding facts, would have shewn, that the defendant meant to charge the plaintiff with perjury punishable by law.

So where the slander was, "he has burnt my barn," the plaintiff cannot sayⁱ, by way of *innuendo*, "my barn full of corn;" because that is not an explanation of the words, but an addition to them. But if, in the introductory part of the declaration, it is averred, *that the defendant had a barn full of corn*, and also, *that in a discourse about that barn*, the de-

^f 4 Rep. 17 b. 3 Bulstr. 227.

^g Johnson v. Aylmer, Crb. Jac. 126.

^h Holt v. Scholefield, 6 T. R. 691. See

also Core v. Morton, Yelv. 27.

ⁱ Per de Grey C. J. in R. v. Horne, Cowp. 684.

defendant had spoken the words, an innuendo, that he meant by those words the barn full of corn, would have been good. This distinction was recognised in a very modern case^k: it was stated in the declaration, that the plaintiff had, in due manner, put in his answer upon oath to a bill filed against him in the Court of Exchequer by the defendant (but it was not averred that the words were spoken in a discourse about that answer,) it was then alleged, that defendant said of the plaintiff that he had forsworn himself (*meaning that the plaintiff had perjured himself in his aforesaid answer to the bill so filed against him*); it was holden, on motion in arrest of judgment after verdict, that the declaration was bad, for want of an averment of a colloquium respecting the answer in the exchequer, which was not supplied by the innuendo, and farther, that the defect was not cured by verdict.

In all cases, therefore, where the words can be understood in an actionable sense only by reference to certain facts, such facts must be distinctly stated in the body of the declaration: for the mere introduction of those facts, under an innuendo, will not be deemed a sufficient averment of them^l; that which comes after the innuendo not being issuable^m; and farther, it must be averred, that the words were spoken in a conversation about those facts. In short, the words must be sufficient to maintain the action without the innuendoⁿ. And the meaning given by the innuendo must be such, as may fairly be collected, either from the words alone, or from the words coupled with facts, which were the subject of the conversation previously averred in the declaration. It is to be observed, however, that although new matter cannot be introduced by an innuendo, but must be brought upon the record in another way, yet where such new matter is not necessary to support the action, an innuendo, without any colloquium, may be rejected as surplusage^o.

It is the province of the jury to decide, whether the defendant's meaning was such as is imputed to him by the innuendo^p.

In an action for calling the plaintiff a thief, it was proved, that the defendant said of the plaintiff, "why don't you come out, you blackguard rascal, scoundrel, Penfold, you

^k *Hawkes v. Hawkey*, 8 East, 437.

^l 1 Bol. Abr. 83. l. 10.

^m *Slecomb's case*, Cro. Car. 443.

ⁿ *Lovet v. Hawthorn*, Cro. Elis. 684.

^o *Roberts v. Camden*, 9 East, 95.

^p Per Gould and Blackstone, Js. 2 Bl. R. 961, 2 cited by Ld. Ellenborough, C. J. in *Roberts v. Camden*, B. R. Nov. 25, 1807.

are a thief^q;" but the witness who proved the words was not asked, whether by the word "thief" he understood, that the defendant meant to charge the plaintiff with felony. Chambre J., in his direction to the jury, said, that it lay on the defendant to shew, that felony was not imputed by the word "thief;" and a verdict was found for the plaintiff. On a motion to set aside the verdict, on the ground, that it appeared from the expressions which accompanied the word "thief," that the defendant did not intend to impute felony, but merely used that word, together with the others, in the heat of passion; that no evidence was given to shew that the word "thief" was understood by those who heard it, to charge the plaintiff with any crime, the court refused the application; Sir J. Mansfield C. J. observing, that the jury ought not to have found a verdict for the plaintiff, unless they understood the defendant to impute theft to the plaintiff. The manner in which the words were pronounced, and various other circumstances, might explain the meaning of the word; and if the jury had thought that the word was only used by the defendant as a word of general abuse, they ought to have found a verdict for the defendant. Supposing that the general words which accompany the word "thief" might have warranted the jury in finding for the defendant, yet, as they have not done so, the court cannot say, that the word did not impute theft to the plaintiff.

IV. *Of the Pleadings—Evidence—Costs.*

Of the Pleadings.

THE general issue in this action is, not guilty.

On the general issue, the defendant will not be allowed to give the truth of the fact imputed to the plaintiff in evidence in mitigation of damages; and this rule holds in all cases, whether the words do or do not import a charge of felony^r, or whether a charge of felony be particular^s, or general^t. If, however, the charge be true, the defendant may *plead* it in justification.

^q *Penfold v. Westcote*, 2 Bos. & Pul. N. R. 335. ^s *Smith v. Richardson*, Willes, 24. Per 8 judges.
^r *Underwood v. Parkes*, Str. 1200. ^t Per 12 judges, S. C.

The defendant may either plead or (what is more usually done under the general issue^u) give in evidence the manner and occasion of speaking the words, to shew that they were not spoken maliciously^z.

As if the words were spoken by the defendant as counsel, and were pertinent to the matter in question^v.

Or in confidence; as when a master, upon being applied to for the character of a servant, honestly and fairly gives the true character of such servant^x (10). In these, and similar cases, an action will not lie, because malice (one of the essential grounds in actions for slander) is wanting.

Evidence.

If the nature of the case requires one or more introductory averments in the declaration, such averments must of course be proved^a.

So if the colloquium alleged be necessary to maintain the action, it must be proved, as where words are laid to be spoken of a person with respect to his office or trade.

The words must be proved as laid in the declaration^b; that is, such of them as will support the action; for it is not necessary for the plaintiff to prove *all* the words stated in the declaration.

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| <p>^u Admitted in <i>Smith v. Richardson</i>,
Willes, 24.</p> <p>^x <i>Brook v. Moutague</i>, Cro. Jac. 91.</p> <p>^y S. C.</p> <p>^z <i>Edmonson v. Stephenson & another</i>,
Bull. N. P. 8. <i>Weatherston v.</i>
<i>Hawkins</i>, 1 T. R. 110.</p> | <p>^a Bull. N. P. 5. cites <i>Savage v. Robery</i>,
Salk. 694.</p> <p>^b <i>Barnea v. Holloway</i>, 8 T. R. 150.
Per Lawrence J. in <i>Maitland v. Gold-</i>
<i>ney</i>, 2 East, 438.</p> |
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(10) "I take the law to be well settled, that where a master is applied to for the character of a servant, the former is not called upon in an action to prove the truth of any aspersions thrown out by him against the latter, but that it lies upon the servant to prove the falsehood of such aspersions. In such case the master is justified, unless the servant prove express malice." Per Chambre J. in *Rogers v. Clifton*, M. 44 Geo. 3. C. B. 3 Bos. & Pul. 594. The case itself is well worthy of attention on this subject, but the circumstances of it are too special for insertion in this work.—N. A servant cannot bring an action against his master for not giving him a character. Per Kenyon C. J. in *Carrol v. Bird*, 3 Esp. N. P. C. 201.

Formerly, indeed, it was holden, that the plaintiff must prove the words precisely as laid^c; but now it is sufficient to prove the substance of them. However, if the words be laid in the third person, *e. g.* *he is a thief*, proof of words spoken in the second person, *e. g.* *you are a thief*, will not support the declaration; for there is a great difference between words spoken in a passion to a man's face, and words spoken deliberately behind his back^d. In like manner a count for slanderous words spoken affirmatively cannot be supported by proof that they were spoken by way of interrogatory; as where the declaration stated^e that the defendant *spoke* these words, "he, the plaintiff, cannot pay his labourers;" and the evidence was, that the defendant had asked a witness "if he had heard that plaintiff could not pay his labourers."

In an action for words of perjury, the plaintiff offered in evidence a bill of indictment, which had been preferred against him by the defendant, and which the grand jury returned *ignoramus*. This was holden to be admissible evidence, to shew the malicious intent with which the words were spoken^f.

If the declaration contain several actionable words, it is sufficient for plaintiff to prove some of them^g.

Express malice need not be proved; if the charge be false, malice will be implied.

Costs.

By stat. 21 Jac. 1. c. 16. s. 6. "If the jury upon the trial of the issue, or the jury *that shall inquire of the damages*, assess the damages *under forty shillings*, then the plaintiff shall recover only so much costs as the damages so assessed amount unto."

It is to be observed, that this statute does not extend to actions founded on special damage only, because, properly speaking, they are not actions for *words*, but for the special

c Bull. N. P. s. cites 2 Rol. Abr. 718.

d Avarillo v Rogers, London Sittings, Trin. 1772. B. R. Ld. Mansfield, C. J. cited by Buller in R v Berry. 4 T. R. 917. where the same doctrine was applied, and Buller J. said he had known a variety of nonsuits on the same objection; although there was a case in Strange & contra, and also a dictum of Lord Hardwicke, C. J.

in Nelson v. Dixie, Ca. Temp. H. 306.

e Barnes v. Holloway, 8 T. R. 150.

f Tate v. Humphrey, B. R. E. 48 Geo. 3. 2 Camp. N. P. C. 73. n. See also Rustell v. M'Quister, ante p. 938. n.

g Compagnon and Wife v. Martin, 2 Bl. R. 790.

damage^h. But where words are actionable in themselvesⁱ, and special damage is laid in the declaration only by way of aggravation, although the special damage be proved, yet if the damages recovered are under 40s. there shall be no more costs than damages. If some of the counts in the declaration be for words that are actionable^k, and others for words not actionable, and special damage be laid referring to all the counts, and there be a general verdict for plaintiff, he is entitled to full costs, though he recover less than 40s. damages.

In a case where the declaration embraced two distinct objects^l, viz. a charge for speaking words actionable in themselves, and a charge that defendant procured plaintiff to be indicted, without probable cause, for felony; it was holden that such an action, not being merely an action for words, but also an action on the case for a malicious prosecution, was not within the statute; and, therefore, although plaintiff recovered damages under 40s. yet he should be entitled to full costs.

In cases within the statute, if damages are under 40s. plaintiff cannot have more costs taxed than the damages, *notwithstanding defendant has justified*^m.

^h *Lowe v. Harewood*, Sir W. Jones, 196.

ⁱ Lord Raym. 1588. *Burry v. Perry*, 2 Str. 936. S. C. *Turner v. Horton*, Wilkes, 438. S. P.

^k *Savile v. Jardine*, 2 H. Bl. 531.

^l *Topsall v. Edwards*, Cro. Car. 163.

Blizard v. Barnes, Cro. Car. 307. S. P.

^m *Halford v. Smith*, 4 East, 567. S. P. said per Clive J. in *Bartlett v. Robbins*, to have been determined in the court of B. R. 2 Wils, 258. E. 5 G. 2.

CHAP. XXXVI.

STOPPAGE IN TRANSITU.

Nature of this Right—Who shall be considered as capable of exercising it—Where the Transitus may be said to be continuing—Where determined—How far the Negotiation of the Bill of Lading may tend to defeat the Right.

NATURE of the Right of stopping in Transitu.—When goods are consigned upon credit by one merchant to another, it frequently happens that the consignee becomes a bankrupt or insolvent, before the goods are delivered. In such case the law, deeming it unreasonable that the goods of one person should be applied to the payment of the debts of another, permits the consignor to resume the possession of his goods. This right, which the consignor has of resuming the possession of his goods, if the full price has not been paid, in the event of the insolvency of the consignee, is technically termed the right of stopping in transitu. The doctrine of stopping in transitu owes its origin to courts of equity, but it has since been adopted and established by a variety of decisions in courts of law, and is now regarded with favour as a right which those courts are always disposed to assist. The following cases will illustrate the nature of this right. B. at London, gave an order to A. at Liverpool to send him a quantity of goods^a. A. accordingly shipped the goods on board a ship there, whereof the defendant was master, who signed a bill of lading to deliver them in good condition to B. in London. The ship arrived in the Thames, but B. having become a bankrupt, the defendant was ordered, on behalf of A., not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared, by the plaintiff's witnesses, that no particular ship was mentioned, whereby the

^a Assignees of Burghall, bankrupt, v. Howard, London Sittings after Hil. T. 32 G. 2. coram Ld. Mansfield C. J. 1 H. Bl. 366. n.

goods should be sent, in which case the shipper is to be at the risk of the perils of the seas. An action on the case upon the custom of the realm having been brought against the defendant as a carrier, Lord Mansfield was of opinion that the plaintiffs were not entitled to recover, and said, he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price has been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property. The plaintiffs were nonsuited.

The right of stopping in transitu does not proceed on the ground of rescinding the contract, but, in the language of Lord Kenyon, it is an equitable lien adopted by the law, for the purposes of substantial justice. Hence the circumstance of the vendee having paid in part for the goods^b will not defeat the vendor's right of stopping them in transitu; the vendor has a right to retake them, unless the full price of the goods has been paid; and the only operation of a partial payment is to diminish the lien, *pro tanto*.

The cases which have been decided on this subject may be arranged under the following divisions: 1st, who shall be considered as capable of exercising the right of stopping in transitu; 2dly, under what circumstances the transitus shall be considered as continuing; 3dly, when the transitus shall be considered as determined; and lastly, where the right of the vendor has been defeated by the negotiation of the bill of lading.

1. *Who shall be considered as capable of exercising the right of stopping in transitu.*—As to the first division, I am aware of two cases only, in which the subject has been brought under the consideration of the court, viz. *Feise v. Wray*, 3 East, 93. and *Siffken v. Wray*, 6 East, 371. From these cases it may be collected, that if the party exercising the right stand in the relation of vendor, quoad the bankrupt or insolvent, it is sufficient; but that a mere surety, for the price of the goods, is not entitled to stop them in transitu. The case of *Feise v. Wray* was shortly this: B., a trader in England, gave an order to C., his correspondent abroad, to purchase a quantity of goods for him. C. bought the goods accordingly of another merchant, (who was a stranger to B. and had not any account or correspondence with him) and

^b *Hodgson v. Loy*, 7 T. R. 440 recognised in *Feise v. Wray*, 3 East, 93. and post.

^c *Feise v. Wray*, 3 East, 93.

shipped them on board a general ship, on the account and risk of B.; the bill of lading was filled up to the order of B. C. drew bills of exchange on B. for the price of the goods, including also a charge for commission. These bills were accepted, but not paid; for, before the goods arrived, B. became a bankrupt; whereupon C. authorised his agent in England to obtain possession of the goods on their arrival, which he did accordingly. An action of trover having been brought by the assignees of B., against the agent of C., to recover the value of the goods, it was contended, on the part of the plaintiff, that the right of stopping in transitu did not attach between B. and C.; that B. must be considered as the principal for whom the goods were originally purchased, and that C. was only his factor or agent, purchasing them on his account, and that the right of stopping in transitu did in point of law apply solely to the case of vendor and vendee; but per Lawrence J. "if that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to the merchants here, from their correspondents abroad, to purchase and ship certain merchandise to them; the merchants here, upon the authority of those orders, obtain the goods from those whom they deal with; and they charge a commission to their correspondents abroad, upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods in transitu. But, at any rate, *this is a case between vendor and vendee; for there was no privity between the original owner of the goods and the bankrupt*; but the property may be considered as having been first purchased by C., and again sold to B. at the first price, with the addition of his commission upon it. He then became the vendor as to B., and consequently had a right to stop the goods in transitu, unless he is estopped by the circumstance of B. having accepted bills for the amount, which bills, it is contended, may be proved under B.'s commission, and are equivalent at least to part payment of the goods; but it was decided, in *Hodgson v. Loy*, 7 T. R. 440. that part payment for the goods does not conclude the right to stop in transitu; it only diminishes the vendor's *lien*, pro tanto, on the goods detained. Then, having lawfully possessed himself of them, he has a lien on them till the whole price be paid, which cannot therefore be satisfied by shewing a part payment only. It is possible that part payment may be obtained by proving the bills under B.'s commission; but if the loss must fall on one side or the other, the maxim applies, "Qui

prior est tempore potior est jure." The court were of opinion, that the assignees were not entitled to recover.

The facts of the case in *Siffken v. Wray* were as follow: B., a trader in London, ordered goods to be shipped to him by C.^d his correspondent at Dantzic, with directions to C. to draw for the amount on D. at Hamburg, (who had agreed to accept the bills, upon receiving a commission on the amount), and to transmit the bills of lading and invoices to D., who was to forward them to B. in London. The goods were shipped, D. accepted the bills, and, on the receipt of the bills of lading, transmitted the same (which were made out to the order of the shippers and not indorsed) to B. in London, who received them, together with the invoices and letter of advice, five days after he had committed an act of bankruptcy. D.'s acceptances were afterwards dishonoured, whereby C. was obliged to take up the bills of exchange. J. S., the agent of D. in England, procured from B. the bills of lading, upon an undertaking that he would dispose of the goods, on their arrival, to the best advantage, and apply the proceeds to the discharge of the bills drawn against them. J. S. having obtained possession of the goods, sold them, and paid the proceeds into the Court of Chancery, to abide the verdict in an action directed by that court to be brought by the assignees of B. against J. S.—C., having been apprised of what had been done by J. S., wrote a letter, signifying his approbation of J. S.'s conduct, and therein claimed the proceeds. The action directed by the Court of Chancery having been brought, the court of B. R. were of opinion that the assignees of B. were entitled to the proceeds: for 1st, D. did not stand in the relation of vendor of these goods quoad the bankrupt, but was a mere surety for the price of the goods, and consequently he was not entitled to stop them in transitu; 2dly, although C. was the vendor of the goods, yet J. S. could not be considered as his agent in this transaction, not having received any authority from C. until after he had obtained possession of the goods; but, supposing him to have been the agent of C. before, yet there was not any adverse taking possession of the goods, inasmuch as they had been taken under an amicable agreement with B. after his bankruptcy.

2. *Under what Circumstances the Transitus shall be considered as continuing.*—As to the second division, under what circumstances the transitus shall be considered as continuing, the cases are more numerous than in the last division, and, as they depend in great measure on their own spe-

^d *Siffken* and another, assignees of *Browne*, bankrupt, v. *Wray*, 6 East, 371.

cial circumstances, it will be necessary to state them at some length. The first in order of time is *Stokes v. La Riviere*, London sittings after Mich. 1784, cited in 3 T. R. 466. and more correctly by Lawrence J. in *Bothamk v. Inglis*, 3 East, 397. Messrs. Duhem, of Lisle, who had just arrived in London, applied to the plaintiff (a ribbon-weaver) for a quantity of ribbon. The plaintiff having received a favourable account, by the defendants, of Duhems' circumstances, packed up goods to a large amount, and delivered them to the defendants to be forwarded to Lisle. These goods, with others purchased in like manner of another tradesman of the name of Twigge, were forwarded, on or about the 12th of May, to the defendants' correspondents at Ostend, with directions to send them to the order of Messrs. Duhem. On the receipt of the goods, viz. on the 29th of May, the defendants' correspondents at Ostend wrote to the Duhems an acknowledgment, and that they waited their directions. On the 12th June the Duhems stopped payment; and, by an instrument signed the 13th August, consented to Twigge's taking back his goods. But Messrs. Duhem not having fulfilled some engagement with the defendants, and being considerably indebted to them, the defendants countermanded the orders they had given to their correspondents at Ostend, as to the delivery of the goods, by letter of the 31st May, and directed them to alter the marks and to deliver them to their order, which was accordingly done; and they were afterwards disposed of in satisfaction of the defendants' demand upon Messrs. Duhem; they contending, that immediately upon the delivery of the goods, by the plaintiff to them, the property vested in Messrs. Duhem, and that they, the defendants, had a right to detain them. Lord Mansfield said, "No point is more clear than that if goods are sold, and the price not paid, the seller may stop them in transitu; I mean in every sort of passage to the hands of the buyers. There have been a hundred cases of this sort; ships in harbour, carriers, bills, have been stopped. In short, where the goods are in transitu, the seller has that proprietary lien. *The goods are in the hands of the defendants to be conveyed*; the owner may get them back again."

In *Hunter* and another, assignees of *Blanchard and Lewis*, v. *Beal*, London sittings after Trin. 1785, cited 3 T. R. 466. an action of trover was brought for a bale of cloth, which was sent by Messrs. Steers and Co. of Wakefield, to the defendant, who was an inn-keeper, directed for the bankrupts, to whom the defendant's book-keeper gave notice that a bale was arrived for them; and Steers and Co. at the same

time sent them a bill of parcels by the post, the receipt of which they acknowledged, and wrote word that they had placed the amount to the credit of Steers and Co. The bankrupts gave orders to the defendant's book-keeper to send the bale down to the Galley Quay, in order to ship it on board the Union, to be carried to Boston. The defendant accordingly sent the bale to the quay; but, arriving too late to be shipped, it was sent back to him. Within ten days afterwards, a clerk of the bankrupts went to the defendant's warehouse, when the defendant asked him what was to be done with the bale in question, and was ordered to keep it in his custody till another ship sailed, which would happen in a few days. The bankruptcy happened soon afterwards; and Messrs. Steers and Co. sent word to the defendant not to let the bale out of his hands: accordingly, when the bankrupts applied for it, he refused to deliver it up. Lord Mansfield was clearly of opinion, that, though the goods might be legally delivered to the vendees for many purposes, yet as for this purpose there must be an absolute and actual possession by the bankrupts: or (as his lordship expressed it) they must have come to the *corporal touch* of the vendees; otherwise they may be stopped *in transitu*; a delivery to a third person, to convey to them, is not sufficient. The preceding case of *Hunter v. Beale* was much commented upon by *Ld. Ellenborough*, in *Dixon v. Baldwin*, 5 East, 184. The impression on his lordship's mind appears to have been against the determination. His words are these: "As to *Hunter v. Beale*, in which it is said, that the goods must come to the *corporal touch of the vendees*, in order to oust the right of stopping *in transitu*, it is a *figurative* expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual *touch*, or of the touch of any other person, it comes in each instance to a question, whether the party to whose touch it actually comes, be an agent so far representing the principal, as to make the delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier, or mean of conveyance to or on the account of the principal, in a mere course of transit towards him. I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee; i. e. when they had arrived at the inn-keepers, and were afterwards, under the immediate orders of the vendee, thence actually launched again in a course of conveyance from him, in their way to Boston; being in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery

is complete, and the transitus for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination."

In *Hunt and others, assignees of Bennet and Heaven v. Ward*, cited in 3 T. R. 467. where goods had been sent by orders from the vendee to a packer; the packer was considered as a middle man between the vendor and vendee; and, therefore, the court held they might be stopped in transitu, on the bankruptcy of the vendee.

So where A. sold goods to B., and, according to B.'s directions, sent them to C. a wharfinger*, to be by him forwarded to B.; it was holden, that while they were in C.'s hands, they might be stopped by A., because they were merely at a stage upon their transit, and could not be considered as having arrived at their final destination.

The plaintiff, living at Leghorn, consigned goods to B. at Liverpool, by a ship chartered on account of B.^f The captain signed three bills of lading, as usual, one of which was sent to B. Before the ship arrived at L., B. became a bankrupt. On the ship's arrival at L. she was ordered to perform quarantine. Pending the quarantine, one of the assignees of B. went on board the vessel, claimed the cargo as belonging to the bankrupt, and put two persons on board with a view of keeping possession. A few days after, but before the expiration of the quarantine, the plaintiff's agent served a notice of the bankruptcy on the captain of the vessel, and claimed the goods on behalf of the plaintiff; a similar notice was served on the assignees, the defendants. It was contended, that the principal's right to stop *in transitu* was completely at an end when the consignee had got possession, by any means, of the goods consigned: that the consignee might have met the vessel at sea on her voyage, and have taken possession by virtue of the first bill of lading, which possession, they contended, would be complete to divest any right the consignor might have to stop the goods in transitu: but Lord Kenyon was of opinion, that this was a stopping *in transitu* sufficient to maintain the action: his lordship said, that in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by the consignee, on the completion of the voyage; that the case put, that the consignee had a right to go out to sea to meet the ship, could not be supported, as it might go the length of saying, that the consignee might

e *Smith and another v. Goss*, 1 Camp. N. P. C. 232.

f *Holst v. Eynal and another*, 1 Esp. N. P. C. 240.

meet the vessel coming out of the port, from whence she had been consigned, and that that should divest the property out of the consignor, and vest it in himself, which was a position not to be supported, as there would be then no possibility of any stoppage *in transitu* at all. That in the present case the voyage was not completed, till she had performed quarantine, till which time she was *in transitu*; and as the plaintiff's agent had given notice, and claimed the cargo before the completion of the voyage, he was of opinion, that the plaintiff had stopped the goods time enough to prevent the property from vesting in the assignee. The Court of B. R., on a motion for a new trial, confirmed the opinion given by Ld. Kenyon. The like judgment was given in the case of Northey and another, assignees of Leyland and another, v. Field, 2 Esp. N. P. C. 613. There a quantity of wine was consigned to B. After the arrival of the vessel, aboard which the wine in question had been shipped, but pending the twenty days allowed for payment of the duty, B. became a bankrupt. After the expiration of the twenty days the wine was removed into the king's cellar, where by the excise law it is allowed to remain three months; during which time the owner may have the wine on paying the duty, warehouse-room, &c.; but if not paid, at the end of the three months, the wine is sold. The day before the expiration of the three months, the agent of the consignors applied for, and endeavoured to obtain, possession of the wine, but in vain. The wine was sold, and the produce paid into the hands of a broker. An action having been brought by the assignees of the bankrupt, who claimed the produce, Lord Kenyon was of opinion, that they were not entitled to recover, observing that the courts of late years had inclined much in favour of the power of the consignor to stop his goods *in transitu*, it was a leaning to the furtherance of justice. Lord Hardwicke had been of opinion, that in order to stop goods *in transitu*, there must be an actual possession of them obtained by the consignor, before they come to the hands of the consignee; but that rule had since been relaxed; and it was now held, that an actual possession was not necessary, that a claim was sufficient, and to that rule he subscribed. In the present case, the bankrupt had no title to the actual possession, until the duties were paid—until they were *quasi in custodia legis*; before the sale, the agent for the consignors claimed, and endeavoured to get possession; that

was a sufficient stopping *in transitu*, in his opinion, to secure the rights of the consignor.

B., resident in Cumberland, purchased a quantity of butter, from A.^h, who agreed to deliver it to D. a carrier. B. desired that it might be marked with the initials of C. his brother's name, to whom he usually sent his butter consigned for sale on his own account, and which initials B. had constantly used for some years upon such consignments. The butter was delivered by the vendors to D., the carrier agreed on, who was desired by B. to forward it as usual to a wharfinger usually employed by B. at Stockton, to be by him shipped for London. It was stated in the case, that D. entered the butter in his way-bill in the name of B., and carried it on his account, the vendor telling him that B. was to pay the carriage. He carried the firkins as far as Bowes, where he delivered them to E., another carrier, who received no other instructions but from the way-bill; E. proceeded with them to Stockton, there delivered them to the wharfinger, who had general directions from B. to send to C. his brother in London. The wharfinger immediately wrote to B. acknowledging the receipt of the butter, and also to C., and acquainted the latter with the name of the ship by which the butter was to be forwarded to London. Before the butter reached London, B. and C. became bankrupts, and the defendant, as agent of the seller, got possession of the butter on its arrival in the river. In an action brought by the assignees of B., one of the questions was, whether there was any such delivery to the bankrupt as was sufficient to divest the vendor's right to stop *in transitu*. It was contended, on the part of the defendant, that there was not; that the delivery to D., in the first instance, and afterwards that by him to E., and by E. to the wharfinger, were all deliveries made to them in the capacity of common carriers, and not as private agents of the bankrupt. The circumstance of the bankrupt desiring D. to carry the goods to the wharfinger as usual, could not vary the nature of the agency. But supposing it did, and that it amounted to the appointment of the wharfinger as a special carrier named by the vendee, that would not alter the vendor's right to stop *in transitu* (1), that Buller J. had

h Hodgson v. Loy, 7 T. R. 440.

(1) It seems, however, that if a person be in the habit of using the warehouse of a wharfinger as his own, and make that the re-

expressly said, in *Ellis v. Hunt*, 3 T. R. 469. that that would make no difference, and that the case of *Stokes v. La Riviere*, where the right was allowed, was a case of delivery to a particular carrier; and as to the mark on the goods, that was not for the purpose of taking possession of them, as in *Ellis v. Hunt*, but merely as a direction to whom they were to be sent. The court were of opinion, that the defendant was entitled to stop the goods *in transitu*. Lord Ellenborough, adverting to the preceding case, in *Dixon v. Baldwin*, 5 East, 185. observed, "that it was a clear case of transit uncompleted; for the butter purchased in Cumberland was proceeding through different stages of county conveyance to the purchaser in London, but before it reached the place of its destination, it was stopped."

B., being a trader at North Tawton in Devonshire, gave orders to the plaintiffs to send the goods in question to him from London, but did not direct that they should be sent by any particular ship¹, his orders were, that they should be sent to him at Exeter to be forwarded to N. T. They were accordingly shipped, arrived at Exeter, and were put into the hands of a wharfinger, to be forwarded to their journey's end. In the books of the wharfinger they were put to the account of B. as the person to whom they were directed, and he was considered as the wharfinger's paymaster. In this state of things a letter was received by the plaintiffs, in which the vendee said, that his situation was such that he should not receive the goods, and that they might take them back again, if they thought proper. The plaintiffs, immediately on the receipt of this letter, sent to the wharfinger, and forbade him to deliver them according to the direction. The wharfinger promised not to deliver them until he could do so with safety, notwithstanding which he afterwards delivered them to the assignees of B. The question was, whether the goods, in the hands of the wharfinger, were in such a situation that the vendors could stop them. The court were of opinion that they were, and that in point of fact, the goods had been stopped *in transitu*; for, although there had not been any corporal touch, yet that took place which was equivalent to it. The plain-

¹ *Mills v. Ball*, 2 Bos. & Pul. 457.

pository of his goods and dispose of them there, that the journey would be considered as at an end when the goods arrived at such warehouse. Per Chambre J. *Richardson v. Goss*, 3 Bos. & Pul. 127.

tiffs gave notice to the wharfinger, and demanded the goods as their property; and the wharfinger undertook not to deliver them until he was certain of a safe delivery. Chambre, J. added, that there was another point, however, upon which he had entertained some doubt. The vendor did not get possession of these goods by his own diligence and care, or in consequence of casual information, but through the intervention of the bankrupt himself, eight days after the act of bankruptcy committed. That circumstance raised some doubt in his mind; since it appeared that the bankrupt had thereby given a preference to the plaintiffs over the rest of his creditors. But still, upon the whole, he was inclined to agree with the rest of the court; that he was not fond of multiplying small distinctions; and thought that too many had been already taken, and the general inconvenience would not be very great, since many cases of this kind were not likely to arise. It seemed indeed that there would be a certain degree of discretion vested in the bankrupt, since he would be empowered to accept goods which were coming to him from one consignor, and to give notice to another consignor to stop them *in transitu*. But, as no fraud appeared to have been committed on the part of the plaintiffs in this case, he was inclined, on this point, as well as the others, though not without some doubt, to concur with the rest of the court. It only remains to observe, that where the right of stopping *in transitu* vests in the consignor, it cannot be divested by any claim made upon the goods in their *transit* by a creditor of the consignee, as, e. g. by process of foreign attachment at the suit of such creditor; or by a common carrier, claiming to retain the goods as a lien for his general balance due from the consignee; for the vendor's right of stopping *in transitu*, is the elder and preferable lien.

3. *When the Transitus may be considered as determined.*—We now proceed to the third division, under which it is proposed to arrange those cases in which it has been decided, that the *transitus* was complete, and the delivery of such a nature as to divest the vendor's right of stopping *in transitu*.

The first case, on this branch of the subject, is that of *Ellis v. Hunt*, M. T. 90 G. 3. B. R. 3 T. R. 464., the facts of which were shortly these: B. ordered a quantity of files from the plaintiff, a manufacturer, at Sheffield; the files were packed in a cask, and sent by a waggon, directed to

B., in London. Before their arrival in London, B. became a bankrupt. On their arrival there, the goods, while they remained at the inn, were attached by a creditor of the bankrupt by process of foreign attachment; afterwards the provisional assignee under B.'s commission demanded the goods from the carrier, and put his mark upon the cask, but did not take it away. A few days afterwards, the plaintiff, who had not been paid for his goods, wrote a letter to the carrier, directing him, in case the goods were not delivered, to keep them in his warehouse, as he had been informed that B. was become a bankrupt. The court were of opinion, that the goods were not in transitu at the time when the plaintiff wrote to countermand the delivery of them; before that, the provisional assignee, who stood in the place of the bankrupt, had put his mark on the cask^m; when the goods were marked, they were delivered to the commissioners as far as the circumstances of the case would permit, for, being under an attachment, the assignee could not then take them away.

Where a part of the goods sold by an entire contract has been taken possession of by the vendee, that shall be deemed taking possession of the whole.

A., at a foreign portⁿ, shipped goods by order and on account of B., to be paid for on a future day, and bills of lading were accordingly signed by the master of the ship; one of the bills was immediately transmitted to B., who, before the arrival of the ship at the place of destination, sold the goods and endorsed the bill of lading to C.; after the arrival of the ship, and a delivery of part of the goods to the agent of C., B. became bankrupt without having paid A. the price of the goods. It was holden, that the transitu was ended by the part delivery, which must be taken to be a delivery of the whole, there appearing no intention, either previous to, or at the time of the delivery, to separate part of the cargo from the rest. So where a number of bales of bacon, then lying at a wharf^o, having been sold for an *entire* sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee, who went to the wharf, weighed the *whole*, and took away several bales, and then became bankrupt; whereupon the vendor, within ten days from the time of the sale, ordered the wharfinger not to deliver the remainder. By the custom of

^m See *Stoveld v. Hughes*, 14 East, 308. ^o *Hammond and others v. Anderson*, and post. 1190, 3. 1 Bos. & Pul. N. R. 69.

ⁿ *Slaby and another v. Heyward and others*, 2 H. Bl. 504.

the trade, the charges of warehousing were to be paid by the vendor, for fourteen days after the sale. It was held, that the contract being entire, and part having been taken away, the delivery to the vendee was complete, and, consequently, the privilege of stopping in transitu could not attach. *Chambre J.* observed, that the payment of the warehouse room, by the vendor, could not make any difference. The vendor, of course, charged just so much more as would pay the expense of warehouse room; that if the expense had been paid by the vendee, it would not make a delivery at the wharf a delivery to him; nor could the vendor avail himself of the circumstance of the expenses being paid by him to prevent a delivery to the vendee from operating as such. This was a much stronger case than the preceding one of *Slubey v. Heyward*: that proceeded upon the principle that a delivery of part, where the contract was entire, was a delivery of the whole; here there was an actual delivery of the whole. The bankrupt had actual manual possession of every article, and having weighed them all, he took upon himself to separate them. *N.* The two last cases of *Slubey v. Heyward* and *Hammond v. Anderson* underwent some discussion in *Hanson v. Meyer*, 6 East, 614. (which see under tit. *Trover*, s. 1.) but their authority does not appear to have been shaken in the slightest degree.

If a person purchase goods here to be sent abroad, and they are delivered on board a chartered ship in a port of this kingdom, such delivery is in effect a delivery to the vendee.

Trover by the assignees of bankrupts, to recover the value of a quantity of tobacco shipped by the defendants, by order of the bankrupts, on board a ship bound from London for Alexandria, which ship was chartered to the bankrupts for three years, from July, 1792, and which was paid for by a bill of three months, drawn by the defendants, on the bankrupts, and accepted by them. The goods were shipped on the 4th of February, 1793, for which the mate's receipt was given, and an invoice thereof made out by the defendants in the names of the bankrupts; the bankrupts were to find stock and provisions, and to pay the master. The vessel was detained by contrary winds at Portsmouth; during which time, the bankrupts having stopped payment about the 11th of March, 1793, the defendants procured bills of lading to be signed by the captain to them, and ob-

p *Fowler and another, assignees of Hunter and Co. v. McTaggart* and

Co. M. T. 38 G. 3. cited in 7 T. R. 449; 1 East, 522; and 3 East, 353.

gained possession of the tobacco in September, 1794, and procured it to be relanded, and afterwards disposed of for their benefit. It was holden, that the delivery was complete, by putting the goods on board the ship, and, consequently, that the assignees were entitled to recover. It will be observed, that, in the preceding case, the bankrupts were to have the entire disposition of the ship, and the complete control over her during the three years. The ship had been on voyage to Alexandria, and had the goods put on board her, to carry them on another voyage to the same place; not for the purpose of conveying them from the vendors to the bankrupts, but that they might be sent by the bankrupts upon a mercantile adventure, for which they had bought them. From not adverting to these material circumstances an inference was drawn from the preceding decision, which the case did not warrant, namely, that the right of stopping in transitu could not exist after a delivery of goods on board a chartered ship. This opinion, however, was exploded in the case of *Bothlingk v. Inglis*, H. 43 G. 3. B. R. 3 East, 381. There a trader, who resided in England, chartered a ship, on certain conditions, for a voyage to Russia, and to bring goods home from his correspondent there, who accordingly shipped the goods on account, and at the risk of the freighter, and sent him the invoices and bills of lading of the cargo. It was holden, that the delivery of the goods, on board such chartered ship, did not preclude the right of the consignor to stop the goods while in transitu on board the same to the vendee, in case of his insolvency, in the mean time, before actual delivery, any more than if they had been delivered on board a general ship for the same purpose.

The plaintiff, a manufacturer at Norwich, agreed with I. S. for the purchase of some pipes of wine, one of which was to be paid for in money, and for the remainder I. S. was to take goods. I. S. wrote to C., his correspondent in London, to send the wines; C. accordingly purchased the wines of D., shipped them, and, by the bill of lading, consigned them to the plaintiff by a vessel employed in the course of trade between Yarmouth and London. On the arrival of the wine at Yarmouth, an agent for the plaintiff received it on his account, and deposited it in the cellar of the defendant, who was to be paid for the cellar room by the plaintiff. A few days after, the plaintiff arrived at Yarmouth, tasted the wines, and took samples of them. Shortly afterwards, D.,

q. Per Lawrence J. 3 East, 396, 7.

r. *Wright v. Lawes*, 4 Esp. N. P. C. 22.

discovering that C., to whom he had sold the wines, was a man of no property, desired the defendant to keep possession of the wine, giving him an indemnity. The plaintiff having brought this action for the recovery, the payment for one pipe, and the agreement as to the remainder, was proved. This, in Ld. Kenyon's opinion, gave the plaintiff a title to the whole. It was then contended, that as the plaintiff lived at Norwich, the goods must be deemed to be *in transitu* until they arrived there; whereas here, they had arrived only at Yarmouth, and had never been delivered at Norwich; that the usual course was, to put them into lighters, at Yarmouth, and forward them to Norwich; so that, until their arrival there, they were *in transitu*, and could be stopped by the owners. But per Ld. Kenyon, "there is no colour for saying that these goods were *in transitu*. I once said, that to confer a property on the consignee, a corporal touch was necessary. I wish the expression had never been used, as it says too much; but here, if a corporal touch was necessary to confer a property on the consignee, it had taken place; but all that is necessary is, that the consignee exercise some act of ownership on the property consigned to him, and he has done so here; he has paid for the warehouse room; he has tasted and taken samples of the wines; but it is said, they have not reached the plaintiff's place of abode, where they were to be ultimately delivered; but I think there was a complete delivery at Yarmouth."

The reader will have collected from the cases in the preceding section, viz. *Hunt v. Heaven* and *Mills v. Ball*, that where goods have been delivered to a packer or wharfinger, for the purpose of being forwarded to an ulterior destination, and the packer or wharfinger may be considered merely as a middle man, in such cases the right of stopping *in transitu* remains. It now becomes necessary to remark, that, where the insolvent has no warehouse, or no other place of delivery than the warehouse of the packer, &c. and there is no place of ulterior delivery in view, the *transitus* will be considered as at end when the goods have arrived at such warehouse, that being their last place of delivery. The following cases will illustrate this rule:

Trover for goods. It appeared, that the goods in question were purchased of the plaintiffs, at Manchester, by one Moisseron (who was the general agent, in London, of the house of Le Grand and Co., of Paris) in the name of that house; that by Moisseron's directions the goods were sent

for him to the house of the defendant, in London, who was a packer, and arrived there on the 3d of Sept. 1802; that, upon their arrival there, Moisseron came to the defendant's house, and had some of the goods unpacked and sent away, and the remainder repacked; that on the 7th September, while the goods so repacked remained in the house of the defendant, news arrived that the house of Le Grand and Co. at Paris, had failed; upon which the plaintiffs tendered to the defendant his charges upon the goods, and required that they should be delivered up to them. It also appeared that *Moisseron had a general power either to send the goods to Le Grand and Co. at Paris, or to Holland, Germany, or such other market, as he should think most beneficial.* It was holden that the goods in the hands of the defendant were not any longer in transitu.

Trover for goods. The goods in question had been ordered by the bankrupt, who was a merchant in London, of Messrs. Wallers, of Manchester, and were forwarded by them, directed to the bankrupt, at the Bull and Mouth Inn, on the 16th March, 1802. On the 23d of March, the goods were sent from the Bull and Mouth Inn to the defendant's house, who was a packer, not in consequence of any orders respecting those particular goods, but in consequence of a general order from the bankrupt to send all goods directed to him to the defendant's house. On the 11th March, the bankrupt, who lived in lodgings, and *had no warehouse of his own*, absconded, leaving no clerk to accept goods or orders for him. On the arrival of the goods at the defendant's house, they were booked for the account of the bankrupt; and the defendant not knowing that the bankrupt had then absconded, and not having any directions from him respecting the goods, caused them to be unpacked with a view to ascertain of what they consisted. On the 31st of March, Messrs. Wallers having learned the situation of the bankrupt's affairs, claimed the goods from the defendant, and on the day after they were demanded by the assignees. The defendant, being indemnified by Messrs. Wallers, refused to deliver the goods to the plaintiffs. It was holden, that the transitus was at an end, inasmuch as there was not any other place of delivery than the warehouse of the packer; the goods, when arrived there, had come to their last place of delivery, and consequently were no longer liable to the right of stoppage *in transitu*.

So, where the goods have so far gotten to the end of their

t Scott and others, assignees of Berkley a bankrupt, v. Pettit, 3 Bos. & Pul. 469.

journey, that they wait for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and if without such orders, they would continue stationary, the right of stopping in transitu is gone.

A. and B.^a, traders, living in London, were in the course of ordering goods of the defendants, cotton-manufacturers, at Manchester, to be sent to M. and Co. at Hull, for the purpose of being afterwards sent to the correspondents of A. and B. at Hamburgh; and on the 31st March, A. and B. sent orders to the defendants for certain goods, to be sent to M. and Co. at Hull, to be shipped for Hamburgh as usual. It was holden, that as between buyer and seller the right of the defendants to stop, as in transitu, was at an end when the goods came to the possession of M. and Co. at Hull, for they were for this purpose the appointed 'agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at Hull, were to receive a new direction from the vendees.

So if after goods are sold^x, they remain in the warehouse of the vendor, and he receives warehouse rent for them, this amounts to a delivery of the goods to the purchaser, so as to put an end to the vendor's right of stopping them *in transitu*.

So where the purchaser of goods received from the seller an order to the wharfinger, in whose warehouse the goods were deposited, to deliver them; and the purchaser, having lodged the order with the wharfinger, he transferred the goods into the name of the purchaser; it was holden^y, that by such transfer the wharfinger became a trustee for the purchaser, and there was an executed delivery as much as if the goods had been delivered into the hands of the purchaser. So where the defendants sold to I. S. a quantity of timber, then lying at their wharf, for the price of which I. S. gave the defendants bills payable at a future day. I. S. having marked the timber with his own mark, afterwards sold it to the plaintiff, who paid him for the same. The plaintiff went to the wharf, apprized the defendants of his purchase, received for answer *that it was very well*, and that they would go with him and shew him the timber, which they accordingly did, and thereupon the plaintiff

^a Dixon and others, assignees of Battersea Bankrupt, v. Baldwin, 5 East, 175.

^x Hurry v. Mangles, 1 Camp. N. P. C. 452.

^y Harman v. Anderson, 2 Camp. N. P. C. 243. See Whitehouse v. Frost, 12 East, 614.

put his own mark on the timber. The bills given by I. S. to the defendants having been dishonoured, they claimed to stop in transitu; but it was holden^a, that there was an executed delivery, and that the plaintiff having given notice to the defendants, that I. S. had sold the property to him, and his then marking it as his own, made an end of the transit, and the defendants could no longer retain or stop the timber. Lord Ellenborough C. J. observed in this case, that the change of mark from A. to B. on bales of goods in a warehouse, had been holden by the House of Lords, in a late case, to operate as an actual delivery of the goods.

4. *How far the Negotiation of the Bill of Lading may tend to defeat the Right of stopping in Transitu.*—Where the property in goods has passed to a vendee, subject only to be divested by the vendor's right to stop them while in transitu, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration, *bonâ fide*, and by endorsement of the bill of lading, (without notice of such circumstances, as render the bill of lading not fairly and honestly negotiable,) given him a right to recover them^a.

The legal title, however, of the endorsee of a bill of lading, may be impeached on the ground of fraud^b; but the mere circumstance of the endorsee knowing at the time when the bill of lading was endorsed and delivered to him, that the consignor had not received money payment for his goods, but had only taken the consignee's acceptances, payable at a future day not then arrived, is not sufficient to invalidate the title of the endorsee, in a case where the absence of fraud and mala fides is found^c.

z Stoveld v. Hughes, 14 East, 308. b Wright v. Campbell, 4 Burr. 2045.
 a Lickbarrow v. Mason, 2 T. R. 63. Salomons v. Nissen, 2 T. R. 674.
 See the argument of Buller J. 6 c Cuming v. Brown, 9 East, 506.
 East, 21. n.

CHAP. XXXVII.

TITHES.

- I. *Definition.—Of the Remedies in the Common Law Courts for the Recovery of Tithes, or the Value thereof.*
- II. *Debt on Stat. 2 & 3 Edw. 6. c. 13. for not setting out Tithes.—Of the Provisions of the Statute, and the Construction thereof.—Of the Persons to whom Tithes are due.—Of the Persons by whom and against whom an Action on the Statute may be brought.—Of the Declaration.—Pleadings.—Evidence.—Verdict.—Costs.—Judgment.*

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- I. *Definition.—Of the Remedies in the Common Law Courts for the Recovery of Tithes, or the Value thereof.*

DEFINITION.—TITHES are a tenth part of the annual increase of land, or of beasts, &c. on the land, and of the labour and industry of the occupier, payable to the parson of each parish for his maintenance.

They are an incorporeal ecclesiastical inheritance, collateral to the estate of the land^a.

As to the time of the introduction of tithes into England, and their being claimed as a civil right, with the history of them before their legal establishment, see Selden's *History of Tythes*.

^a 11 Rep. 13. b.

Before the stat. 32 H. 8. c. 7. an action for tithes could not have been maintained in the temporal courts; but by the 7th section of that statute it is enacted, "that any persons having an estate of inheritance, freehold, term, or interest in tithes, and being disseised, or otherwise kept or put out of possession thereof, shall have such remedy in the temporal courts for recovering the same as the case may require, in like manner as they may for lands, tenements, and other hereditaments." By force of this statute, tithes have at this day all the incidents belonging to temporal inheritances. Hence an ejectment may be maintained for tithes^b.

Where the person entitled to tithes agrees by parol with the occupiers of the land, that they shall hold the lands discharged of tithes for a certain time, or during the life of the tithe-owner, in consideration of the payment of a certain sum annually, an action of indebitatus assumpsit may be maintained by the tithe-owner, against the occupier, for the non-payment of the sum agreed on.

In order to support this action, the plaintiff must prove the occupation of the defendant, the agreement, and the retention of the tithes under that agreement^c.

If by the terms of the agreement the money is to be paid on a certain day^d, interest will be recoverable from that day; but if it is simply agreed, that the money shall be paid, and there is not any day fixed for the payment, then the interest cannot be recovered.

By stat. 7 & 8 W. 3. c. 6. (made perpetual by stat. 3 & 4 Ann. c. 18. s. 1.) a summary method of proceeding before two J. P. is prescribed for recovering small tithes under the value of 40s. But this statute contains a proviso^e, that if the party complained of shall insist before the J. P. upon any prescription, composition, modus, agreement, or title, and deliver the same in writing to the J. P. subscribed by him or her, and shall give security to the complainant to pay such costs as, upon a trial at law, shall be given against him, in case the prescription, &c. be not allowed, then the J. P. shall forbear to give judgment, and the complainant may prosecute the adverse party for the subtraction of tithe in any court, as before this act. The 9th section directs the judgment given by virtue of this statute to be enrolled at the next general quarter sessions, and after enrolment, and

^b *Priest v. Wood*, Cro. Car. 301.

^c *Peake's Evid.* 411. ed. 3d.

^d *Shiple v. Hammond*, London sitting, H. T. 44 G. 3. Lord Ellenbo-

rough C. J. 5 Esp. N. P. C. 114. See quere.

^e S. 9.

satisfaction made, the judgment shall be a bar to conclude the party entitled to the tithe from any other remedy.

By stat. 7 & 8 W. 3. c. 34. (made perpetual and extended to all customary payments^f belonging to any church or chapel by 1 Geo. 1. stat. 2. c. 6.) the like remedy is extended to *all* tithes due from Quakers, and two J. P. are empowered to ascertain what is due, and to order payment, so as the sum ordered does not exceed 10*l*.

For the mode of proceeding under these statutes, see Burn's Just. tit. Tithes.

Another remedy for the subtraction of tithe is, the action of debt on the stat. 2 E. 6. which will be the subject of the following section.

II. Debt on Stat. 2 & 3 Edw. 6. c. 13. for not setting out Tithes.—Of the Provisions of the Statute, and the Construction thereof.—Of the Persons to whom Tithes are due.—Of the Persons by whom and against whom an Action on the Statute may be brought.—Of the Declaration.—Pleadings.—Evidence.—Verdict.—Costs.—Judgment.

Of the Provisions of the Statute, and the Construction thereof (1).

By the first section of this statute it is enacted, "that every of the king's subjects shall truly and justly, without fraud or guile, divide, set out, and pay all manner of their *predial tithes* (2) in their proper kind, as they arise, *in such manner and form as hath been of right yielded and paid with-*

^f See R. v. Wakefield, 1 Burr. 485. Burn's J. tit. Tithes, §. C.

(1) See Sir Edward Coke's exposition of this statute, 3 Inst. 648.

(2) Remarks will be found in the subsequent pages on those parts of the statute which are printed in italics.

in forty years next before the making this act, or of right or custom ought to have been paid. And no person shall carry away such, or like tithes which have been yielded or paid within the said forty years, or of right ought to have been paid in the places tithable, before he has *justly divided or set forth*, for the tithe thereof, the tenth part of the same, or otherwise agreed for the tithes with the parson, vicar, or other owner or farmer of the same tithes, under the pain of forfeiture of treble value of the tithes so carried away."

This statute was made soon after the dissolution of the monasteries, before which time the tithes were in the hands of religious persons, and the usual remedy for the subtraction of them was in the ecclesiastical courts. But, when tithes became lay fees, it was thought necessary to provide a remedy for these injuries in the temporal courts, and this statute was made for that purpose. It is worthy of remark; however, that several years (nearly forty) elapsed before any proceeding was instituted on this statute in the temporal courts. An opinion at first prevailed, that as the person to whom the treble value was given was not specified, such value belonged of right to the king. But in *E. T. 29 Eliz.* upon an information filed by the Queen's attorney-general against one Wood, for not setting out his tithe, whereon the defendant was found guilty, it was solemnly adjudged by the Court of Exchequer, (upon motion in arrest of judgment) that the treble value did not belong to the king, but to the party interested, who might maintain an action of debt for recovering the same. In conformity with this opinion, an action of debt at the suit of the party interested, (more frequently termed, the party grieved) has ever since been considered as the proper remedy; and in *Beadils v. Sherman*, *E. T. 40 Eliz. B. R.* (see the record, *Co. Ent.* p. 161. 2d. ed.) where this form of action was adopted, the plaintiff obtained judgment; although, on motion in arrest of judgment, it was urged, that as the statute had not mentioned the court in which the treble value was to be recovered, the only remedy was in the spiritual court. This judgment was afterwards affirmed on error in the Exchequer Chamber. "And now, (adds Sir J. Coke, at the conclusion of the record, *Co. Ent.* p. 162.) actions of debt on this statute are frequent and usual."

[*Predial Tithes.*—This clause is expressly confined to predial tithes, and does not extend to mixed or personal tithes. Hence, where in an action on this statute for not setting out the tithes of *cheese, calves, lambs, &c.* the plain-

tiff obtained a verdict; on motion in arrest of judgment^g, it was objected, that the tithes in question were not *predial* tithes, and consequently not within this statute, which, being penal, ought not to be extended by equity; and of this opinion was the whole court. So where the plaintiff declared for not setting out predial tithes^h, and other tithes, as the tithes of lamb, wool, &c. and the jury found a general verdict, judgment was arrested upon the like objection.

In general, under the term *predial* tithes are comprehended the tithes of such products of the earth as are renewed yearly, either spontaneously or by culture; as the tithes of corn, flax, hay, hops, saffron, woadⁱ, &c.; and the fruit of trees, as apples, cherries, pears, &c.

Description of predial Tithes.—Tithe of wood also, as coppice-wood, &c. (3), is predial, and must be set out on the spot at the time of falling, but timber-trees (gros boys), of the age of twenty years or more, are exempted from paying tithe by stat. 45 Edw. 3. c. 3. That statute, which is declaratory of the common law^k, has been construed to comprehend all timber-trees, (of twenty years' growth or upwards) whether timber by law, as oak, elm, or ash; or by custom, as beech in Buckinghamshire and other places^l; and the exemption from tithe, by operation of this statute, extends not to the body of such trees only, but also to the bark^m, lop, and topⁿ. The subsequent use and application of the wood will not make that tithable which was not before tithable (4). Hence it has been resolved, that the tops and lops of pollard oaks, ashes, and elms, (such oaks, &c. being above twenty years' growth), although cut for the purpose of being used as fuel, are not tithable^o; and further, that the age of the tops and lops is immaterial; the

^g Booth v. Southraie, 2 Inst. 649.

^h Pain v. Nichols, 1 Brownl. 65.

ⁱ Norton v. Clarke, 1 Gwill. 422.

^k Per Lord Hardwicke C. in Walton v. Tryon, Ambl. 132, 3.

^l Abbott v. Hicks, 1 H. Wood, 320.

^m Layfield v. Cowper, 1 H. Wood,

330.

ⁿ 2 Inst. 643.

^o Ambl. 132.

^p Walton v. Tryon, Ambler, 130.

(3) "All coppice woods are liable to tithes; and although *non annuatim renovantur*, yet in a certain course of time after they are cut, they grow up again like saffron, which in some places is not gathered oftener than once in three years; but as to timber-trees, from the ordinary use of them, the law is otherwise; they are not cut at a certain stated time." Per Ld. Hardwicke C. in Walton v. Tryon and others, Ambl. 131.

(4) But it seems that wood, applied to special purposes, may be exempted from tithes by special custom, but not otherwise.

trees whence they were taken having been once privileged. In like manner, faggot-wood, and billets made of top-wood, cut from timber-trees of above twenty years' growth, before they were made pollards, are not tithable. It is laid down in 2 Inst. 643. that if a person cut down timber-trees, tithe shall not be paid for the germins which grow out of the roots, of what age soever, for the root is parcel of the inheritance. But this position is said by Ld. Hardwicke, Amb. 138., to have been contradicted, and for good reason; because a great part of coppices grow from germins of old timber trees, and it would deprive the clergy of great part of their tithes.

Wood growing in hedge-rows, not being timber, is tithable.

The parson *de mero jure* is entitled to tithe-wood, if the vicar be neither endowed of the same, nor claims to have it by prescription.

It seems, that an action of debt may be maintained on this statute for not setting out small tithes, as well as great tithes, provided they are predial tithes.

[In such manner and form as hath been of right yielded and paid within forty years next before this act, or of right or custom ought to have been paid.]

In debt on this statute by a rector, it was stated, in the declaration, that the plaintiff was rector of the parish, and the defendant occupier of lands within the same; that the tithes were within forty years next before the statute of right yielded and payable, and yielded and paid; that defendant, in November, 1791, ploughed and sowed the land with corn, which he afterwards carried away, without setting out the tithe: on *nil debet* pleaded, it appeared at the trial, that the land in question, as far back as any witness knew, had been in grass, and had been ploughed for the first time in 1791, and no evidence was given of its ever having paid tithe. Chambre, for the defendant, contended, that the jury were bound to find for the defendant, unless they found that tithes had actually been paid in respect of this land within forty years before the statute, of which there was not any evidence; on the contrary, the evidence given rather went to rebut such a presumption, and was sufficient to warrant the jury in presuming a grant in favour of the

p Morden v. Knight, M. T. 26 G. 2. Scac. 2 Gwm. 841. r Percur. in Renoulds v. Green, 2 Bulst. 27. See Norton v. Clark, 1 Gwm. 438.
q Biggs v. Martin and another, 1 H. Wood, 321. Mantell v. Paine, P. 38. s Mitchell v. Walker, 3 T. R. 260. See post. under tit. Evidence, Halliwell v. Trappes.
G. 3. Scac. 4 Gwm. 1504.

defendant. Verdict for plaintiff. On a motion to enter a nonsuit, *Lord Kenyon*, C. J. said, that the usage had constantly been against the necessity of the proof contended for by the defendant; that he remembered many actions having been tried, where the lands, in respect of which the tithes were claimed were lately enclosed, and where the same objection, had it been available, must have prevailed; but the plaintiff recovered in all: that the non-payment of tithe of itself signified nothing; and that there was not any ground for saying, that tithe ought not to have been paid here. *Buller J.* observed, that with respect to the presumption of a grant in favour of the defendant, he thought he could not leave that question to the jury without some evidence to support it, and here was none: *if indeed it had appeared that this land had been ploughed before, and yet no tithes had been exacted for it, that might have afforded some ground for such a presumption*^a, but he thought that the onus of proving the exemption lay with the defendant. Rule discharged.

But in a case where the declaration merely stated^b, that the tithe had been yielded and paid forty years before making the act, without averring that tithes were *payable, and of right ought to be paid*, and there was not any evidence of tithe ever having been paid; it was holden, that the plaintiff could not recover. The court, however, granted a new trial, ordering the declaration to be amended by the introduction of the necessary averment. It was admitted by *Wilmot C. J.* (delivering the opinion of the court in the preceding case) that if it appeared that the land had never paid tithe, *and had been constantly ploughed*, it would be open to presumption of a grant; but that the onus of proving the exemption lay on the defendant.

Justly divided or set forth.—If the owner justly divide the tithe from the nine parts^c, and sets it out, but immediately afterwards carries the same away; this will be considered as fraud and guile within this statute.

Agreed for the Tithes with the Parson, &c.—Although a lease of tithes cannot be without deed^d, yet a parol agreement for retaining tithes will be sufficient to bar the parson, &c. of his action of debt on this statute. An agreement for the retaining of tithes is frequently termed a composition;

^a See the same opinion expressed by *Wilmot C. J.* in *Mansfield v. Clarke*, 5 T. R. 265. n.

^b *Mansfield v. Clarke*, 5 T. R. 264. n.

^c Gwm. 950. n. (g) S. C.

^d *Heale v. Sprat*, 2 Inst. 649. *Anderson's case*, Clayton, 20. S. P.

^x *Bernard v. Evans*, 1 Lev. 24. T. Raym. 14. S. C.

but in the adoption of this term, care must be taken not to confound it with a composition real, which is an agreement of a different nature, and upon which some remarks will be made, when that term occurs in the subsequent provisions of this statute.

It is clear, that where a parson, &c. has entered into an agreement with the occupiers of the land for the retaining of their tithes, an action cannot be maintained for not setting out the tithe, until such agreement or composition is determined, and that such composition cannot be determined by the parson, &c. without giving a reasonable notice to the occupiers of the land. I am not aware of any case in which it has been solemnly adjudged what is reasonable notice for the determination of such composition.

It will be proper, however, to remark, that in *Wyburd v. Tuck*, 1 Bos. & Pul. 465. Buller J. considered this point as quite determined, observing, that in the case of *Hewit v. Adams*, D. P. April 19th, 1782, where the notice had been given only one month before Michaelmas Day, at which time the composition was payable, upon a question put to the judges, whether such notice was sufficient, they were unanimously of opinion, it was not; and said expressly, *that a notice to determine a composition ought to be given with analogy to the notice given in a holding of land.*

So in *Bishop v. Chichester*, E. 27 G. 3. In Canc. 4 Gwm. 1316. 2 Bro. Ch. C. 161. S. C. Ld. Thurlow C. said, that he thought the rules of notice for determining compositions for tithes were exactly the same as those between landlord and tenant from year to year. In *Wyburd v. Tuck*, 1 Bos. & Pul. 458. the principle of the above-mentioned decision in the House of Lords was adopted by Buller, Heath, and Rooke, Js. (5). Agreeably to these opinions, reasonable

(5) Eyre C. J. expressed a different opinion, observing, "that the analogy between land and tithe did not appear satisfactory to him; land was either taken on a holding from Lady-day, or from Michaelmas, or from some other time, and then notice to quit must be given accordingly. But if a composition is to be determined on any just principles, the notice must be given from a period suitable to the nature of the tithes, and with relation to the manner and cultivation of the land. There must be such a rule as will enable the tenant to cultivate his land in the manner most beneficial to himself, accordingly as he is to pay a composition or in kind." It has always been the received opinion of the Court of Exchequer, that such a reasonable notice should be given as might determine the farmer in what manner to cultivate his land.

notice for the determination of a composition is *half a year's* notice, ending at the expiration of the year.

The general doctrine laid down in *Hewitt v. Adams*, as to the necessity of a notice to determine a composition, was recognized in *Fell v. Wilson*, 12 East, 83., where it was holden, that a mere general demand of tithe and a refusal to take the sum tendered could not be considered as a determination of a subsisting composition.

A composition between the incumbent and the occupiers of land within the parish, determines on the death of the incumbent⁷, and his successor is not obliged to give notice of his intention to take the tithes in kind; but if the successor, after induction into the benefice, accept the composition, such acceptance will be deemed a confirmation, and in such case the regular notice must be given (8).

If a rector, &c. having made a composition⁸, lease tithes, and the lessee makes no alteration in the composition; when the tithes revert to the rector, &c. the occupier of land will continue to hold under the composition originally made by the rector, &c. and consequently will be entitled to notice, before the rector, &c. can take the tithes in kind.

The late vicar of A. made certain compositions with his parishioners for the vicarial tithes⁹, which were payable on the 29th September; and the Easter offerings were payable on the 10th April in each year; and having received his compositions up to the 29th September, 1802, he died on the 10th March, 1803. In the May following the defendant, the present vicar, was presented, and in November following was inducted. The Easter offerings were collected by the sequestrator after April, 1803, and were paid over by him to the defendant; and after Michaelmas, in the same year, the defendant received the vicarial tithes from some of the parishioners, according to the composition of his prede-

⁷ *Agreed in Brown v. Barlow*, H. 3 G. 2. ⁸ *Wyburd v. Tuck*, 1 Bos. & Pul. 458.
⁹ *Scacc. 3 Gwm. 1001.* ⁹ *Williams v. Powell*, 10 East, 269.

(6) A rector agreed with an occupier of land for a certain sum of money, in lieu of tithes payable yearly at Michaelmas^{*}. The rector died about a month before Michaelmas. It was decreed, that, the agreement having been determined by the death of the rector, the successor should be entitled to tithes in kind from such death, and the executor of the last incumbent to a proportion, according to the agreement, until the death of the testator.

^{*} M. T. 1730. Bunb. 394.

cessor, and from others according to new compositions, some more, some less, than the former, in all to the amount of 181*l.* and upwards. The plaintiffs, who were the personal representatives of the late vicar, brought this action for money had and received, against the present vicar, to recover a proportion of such compositions up to the time of the late vicar's death, amounting, as they calculated them, to 68*l.* and upwards. The defendant disputed his liability to account for the compositions which were not due till his own time, but paid 20*l.* into court, in order to cover any small sums which might have been due for tithes or dues, which, if received in kind, might have accrued between the 29th of September, 1802, and the death of his predecessor on the 10th of March, 1803; which sum, it clearly appeared, was more than sufficient to cover any such tithes or dues. It was contended that the present vicar, having adopted the compositions made by his predecessor, and received them as such; and the consideration for such payment being for tithes, part of which, at least, had accrued in the time of such predecessor, had thereby charged himself with receiving a proportionable part of the gross sum, up to the time of his predecessor's death for his use, and had admitted his liability *pro ratâ* to the plaintiffs, by payment of money into court. This case was compared to the case of *Paget v. Gee*, *Ambl.* 198. 1 *Burn's Just. tit. Distress*, s. 18. where tenant in tail having leased, but not according to the statute, and dying without issue between the days of payment, and the remainder man having received the whole rent, Lord Hardwicke held the latter liable to account for a proportion up to the death of tenant in tail; but, per Lord Ellenborough C. J., in the case cited, each day's occupation by the tenant was valuable to him, and therefore there might be an equitable apportionment of the rent accruing from day to day, in respect of such valuable occupation; and the remainder-man, who received the whole, might well be considered as equitably accountable for the proportion which accrued in the time of the tenant in tail. But here the composition was at an end by the death of the former vicar, and the present vicar in fact received nothing for him; for no tithes had become due since the last payment in September, beyond what the money paid into court was sufficient to cover.

Second Section of Stat. 2 & 3. Ed. 6.—"The second section empowers the rector, &c. or his servant, to see that the tithe is justly set forth, and to carry away the same, and

gives a remedy in the ecclesiastical court for the recovery of the *double value* of tithe subtracted with *costs*."

As to the first part of this branch, it is merely declaratory of the common law, because, for stopping the way of the party to whom the tithes ought to be paid, an action on the case might have been maintained at common law. As to the second part, it is to be observed, that the parson, &c. was entitled in the ecclesiastical court to recover the tithes themselves, and therefore the double value in addition made the recovery in the ecclesiastical court equivalent to the treble forfeiture under the former clause; but costs being given by this action, rendered the suit in the ecclesiastical court more advantageous; for, at the common law, the plaintiff was not entitled to costs^b; but now, by stat. 8 & 9 W. 3. c. 11. s. 3. "in actions of debt upon the statute for not setting forth tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, the plaintiff obtaining judgment on any award of execution, after plea pleaded or demurrer joined, shall recover his costs." In like manner, if the plaintiff was nonsuit, or the defendant obtained a verdict, the defendant was not entitled to costs under the stat. 23 H. 8. c. 15.; for an action on this stat. 2 E. 6. was not an action upon a specialty or contract, nor for a wrong personal immediately done to the plaintiff, but for a non-feasance^c; but now, by the same stat. 8 & 9 W. 3. c. 11. s. 3. "if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs."

Third Section of Stat. 2 & 3 Edw. 6.—The third section provides, "that tithe of cattle, feeding in any waste whereof the parish is not known, shall be paid to the parson, &c. of the parish in which the owner of the cattle dwells."

Fourth Section.—By the fourth section it is enacted, "that no person shall be sued or otherwise compelled to yield or pay tithes for any manors, lands, &c. which either by the *laws and statutes of the realm*, or by any *privilege or prescription*, are not chargeable with the payment of tithes, or are discharged by any *composition real*."

Laws of the Realm.]—That is, by the common law and customs of the realm. Of common right, no tithes are to be paid of quarries of stone or slate, because they are parcel

^b 2 Inst. 651.

^c Downton v. Finch, T. 43 Eliz. C. B. 2 Inst. 651.

of the freehold^d, and the parson hath tithe of the grass or corn which grows upon the surface of the land in which the quarry is; so also not for coal, turf, flags, tin, lead, brick, tile, earthen pots, lime, marle, chalk, and such like, because they are not the increase, but of the substance of the earth. And the like has been resolved of houses considered separately from the soil, as having no annual increase; but by particular custom, tithes of any of these may be payable.

Statutes.]—See stat. 27 H. 8. c. 20.—31 H. 8. c. 13.—32 H. 8. c. 7.

Privilege or Prescription.]—At the common law^e, spiritual persons, that is, bishops, abbots, &c. were capable of a discharge of tithes, 1, By bull of the pope; 2dly, By composition; 3dly, By prescription; and these were absolute; 4. By order, as the Cistercians, Templars, and Hospitallers of Jerusalem (7). This privilege was granted to these orders, by an ancient council, explained by the council of Lateran, A. D. 1215, and allowed by the general consent of the realm^f, but it extended to such lands only as they had before the council, A. D. 1215, and could be enjoyed only by the religious persons themselves, while those lands remained in their manurance. The greater part of these exemptions would have fallen with the spiritual persons, to whom they were annexed, upon the dissolution of the abbeyes by Henry VIII. had they not been supported and upholden by the 21st section of the stat. 31 H. 8. c. 13. (by which all the religious houses above the value of 200*l.* per annum, were dissolved); whereby it is enacted, “that the king, and every person having hereditaments belonging to monasteries, or other religious houses, shall enjoy the same, discharged of *payment* of tithes, in as large and ample a manner as the abbots, &c. enjoyed the same, at the time of their dissolution.” By virtue of this clause, laymen holding abbey lands enjoy the several exemptions from tithe before-mentioned, as derivatives from

^d 2 Inst. 651.

^f See *Stavely v. Ullithorn*, Hardr. 101.

^e Hob. 296, 7.

(7) Pope Innocent the Third, A. D. 1197, by bull or decretal epistle, discharged the order of Præmonstratenses from the payment of tithes for lands of their own culture; but this bull not having been received and allowed in England, it has been holden, that lands, formerly parcel of a greater abbey of this order, are not, by virtue of the said bull, exempt from payment of tithe. *Townley v. Tomlinson*, T. 2 G. 3. Scacc. 3 Gwm. 1004. *Same v. same*, E. 11 G. 3. Scacc. 3 Gwm. 1017.

the religious persons, who were entitled to them previously to the dissolution. And not only tenants in fee of such lands enjoy these exemptions, but also where the estate is divided into portions, as under a marriage-settlement, the several parties, whether tenants for life^g, or in tail^h, as they successively come into possession, are entitled to hold the lands tithe free.

By virtue of this clause, also, the owner of abbey lands is entitled to a discharge from tithe, if he can shew that at the time of the dissolution there had been an unity of possession of the rectory and land tithable from time immemorial, and there be not any evidence that tithes have ever been paid; for, although a perpetual unity, in the prior of the monastery, or religious house, before the statute, operated not as a discharge, but only as a suspension of payment, because he could not pay tithes to himself; yet, inasmuch as the greater part of the monasteries were discharged from tithe, by bull or prescription, the courts, after a lapse of years, will presume that such discharge existed at the time of the dissolution, but that the records, or proofs of those discharges, cannot be produced after so long a unity in possession. A discharge by unity therefore is, as Pollexfen terms it, a discharge by bull, or by prescription *presumed*, but not proved. And the mere circumstance of the lands tithable being under lease at the time of the dissolution, will not destroy this presumptionⁱ; but if it appear that the lessee paid tithe, that will destroy the presumption^k.

Lands formerly belonging to a Cistercian abbey are discharged of tithes^l, whilst in the manurance of the owner, although such lands were under lease for years (8) at the time of the dissolution of the abbey; for the privilege, though personal, existed at the time of the dissolution, though not in *esse*, yet in right; and the reversioners were entitled to the discharge, as soon as the lands reverted into their own hands.

It is to be observed^m, that the lands belonging to those

g Hett v. Meads, T. 39 G. 3. Scacc. 1 Cowley v. Keys, Scacc. 1799. 4 Gwm. 4 Gwm. 1515.
 h Wilson v. Redman, Hardr. 174. 1303. per Eyre C. B. recognising
 i Wildman v. Oades, Pollexfen, 1. Porter v. Bethurst, Cro. Jac. 559.
 k Benton v. Trot, Moor, 528. 2 Roll. Rep. 142. Palm. 118. Dyer, 277. b. S. C. in marg.
 m Clayt. 41. pl. 70.

(8) Or for life, or in tail, per cur. in Wilson v. Redman, Hardr. 190. Hett v. Meads, Trin. T. 1799. Excheq. 4 Gwm. 1515, 16.

abbeys which came to the crown by stat. 27 H. 8. c. 28. (that is, the lesser abbeys,) are not entitled to these exemptions, although such lands were discharged in the hands of the religious houses; for that statute does not contain any clause similar to the 21st section of 31 H. 8. c. 13.

In *Fosset v. Francklin*, T. Raym. 225. and *Star v. Elyot*, Freem. 299, it was holden, that lands formerly parcel of the possession of the prior of St. John of Jerusalem, and which came to the crown by 32 H. 8. c. 24., were discharged from payment of tithes.

Having enumerated the several discharges from tithe, which were enjoyed by religious persons at the common law, and before the dissolution of monasteries, and by laymen, as derivatives from those religious persons since that period, it remains only to add a few observations relative to the exemptions from tithes, which might be claimed by laymen at the common law; and these were two only—1st, by composition real; and 2d, by prescription *de modo decimandi*; for it is clearly established^a, that by the common law a layman cannot prescribe in a non decimando (9), or set up as a defence to a claim of tithe, the mere non-payment of tithe from time immemorial, whether the party claiming the tithe be lay impropiator^b, or ecclesiastical rector, and whether the non-payment extend to all, or a portion^c only of the tithes.

And this, says Hobart, is *in favorem ecclesie*, lest laymen should spoil the church. But there is a distinction between a prescription in non decimando, and a claim of

^a *Breary v. Mauby*, 3 Wood's Dec. 43.

3 Burn's Ecc. L. 432. 3 Gwm. 904.

^b *Burg. of Bury St. Edmund's v. Evans*, Com. Rep. 643. 2 Gwm. 757.

S. C. Jennings v. Lettis, 3 Gwm. 959. S. P.

^c *Nagle v. Edwards*, H. 36 G. 2. Scacc. 4 Gwm. 1442. (10).

(9) Neither can a hundred or a county prescribe in a non-decimando, for a thing that is in its nature *de jure* tithable; but of things which in their nature are not tithable *de jure*, a hundred or county may prescribe in a non decimando; because in such case they are discharged without a custom to the contrary, and they do but insist on their ancient right, and that the custom hath not prevailed against it. *Hicks v. Woodson*, Ld. Raym. 137. Sulk. 655. S. C.

(10) But see the remarks of Ld. Loughborough C. on this case, in *Rose v. Calland*, 5 Ves. jun. 186.

all or a portion of tithes, supported by evidence of actual enjoyment or the pernaney of tithes. The former is, as before remarked, unlawful, and cannot be maintained. Nor can any presumption be admitted to support it. The title to the latter is not unlawful, and long possession is evidence of it. Hence, where there has been an actual pernaney of all^a or a portion^r of tithes, by lay hands under conveyances as lay property for a long period of time, a court of equity will not interpose in favour of the rector, &c. to disturb such possession (which might have a lawful commencement), by calling on the defendants to shew a lawful commencement.

The king is not by virtue of his prerogative discharged of tithes for the ancient demesnes of the crown, but he is capable of a discharge *de non decimando* by prescription; because he is *persona mixta*, as well as a bishop. But if the king alien any of his lands so discharged, his patentee shall pay tithe^s; and, from the time of such alienation, the prescription is destroyed for ever, although the same should afterwards come into the king's hands again by escheat or otherwise^t.

Composition real.]—A composition real, according to Gibson^a, is, "where the incumbent, *together with the patron and ordinary*, make agreement by deed executed under their hands and seals, that certain lands shall be discharged from the payment of tithes in specie, in consideration of a recompence to the incumbent, either in money or in lands, to him and his successors for ever, or in some other thing for their benefit and advantage." So Sir Simon Degge^x observes, "That which we call a real composition is where the present incumbent of any church, together with the patron and ordinary, do agree, under their hands and seals, or by fine in the king's courts, that such lands shall be freed and discharged of payment of all manner of tithe for ever, paying some annual payment, or doing some other thing to the ease, profit, or advantage of the parson or vicar, to whom the tithes did belong."

From the preceding definitions, it appears that there must be the following requisites to constitute a real composition:

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| q Fanshaw v. Rotherham, L. I. H. March 14, 1759. Henley Lord Keeper, 3 Gwm. 1178. | s Hotham v. Forster, 3 Gwm. 869. |
| Edwards v. Vernon, 23 Feb. 1781. Scacc. | t Compost v. —, Hard. 315. |
| r Scott v. Ayrey, T. 19 G. 3. Scacc. | u Gibson's Codex, tit. 38. c. 5. p. 705. |
| Strat v. Baker, 2 Vez. jun. 625. | x Degge, pt. 2. c. 20. |

1. That the tithe be discharged; 2. That a composition be given in lieu of such discharge; 3. That the composition must be made with the consent of the patron and ordinary; 4. To these it may be added, that a composition must have been made before the stat. 13 Eliz. c. 10.; for, by the third section of that statute, "masters and fellows of colleges, deans and chapters, masters of hospitals, parsons, vicars, or other persons having ecclesiastical living or tithe, are restrained from making any conveyance of the same, other than by lease for 21 years, or three lives, from the time when such lease shall be made, and reserving thereupon the accustomed yearly rent." And it has been holden^y, that a decree in equity, confirming an agreement for the acceptance of land, in lieu of tithe made since the stat. 13 Eliz. c. 10. is not binding on a succeeding incumbent, although such agreement was sanctioned by the concurrence of all the parties, and although it had been acquiesced under for 130 years.

The best evidence of an agreement for a real composition is the production of the deed whereby it was created; where the deed cannot be produced, some evidence must be given referring to the deed, or shewing that it once existed, independently of mere usage; for if it were otherwise the church would be defrauded, and every bad *modus* turned into a good composition^z.

5th Section of Stat. 2 & 3 Ed. 6.—By the 5th section it is enacted, "that if *barren heath or waste ground*, (other than such as is discharged from the payment of tithes, by act of parliament) which has laid barren and paid no tithes, by reason of the same barrenness, be improved and converted into arable ground or meadow, it shall, after the end of seven years next after such improvements, pay tithe of corn and hay growing upon the same."

But^a if any such barren waste or heath ground, has been charged with the payment of any tithes, and the same be improved or converted into arable ground or meadow, the owner shall, during the seven years next following after the improvement, pay such kind of tithes as was paid for the same before the improvement.

Barren Heath or Waste Ground.—*Barren ground*^b is un-

^y *Jones v. Snow*, T. 20 G. 3 Scacc. ^z *Heathcote v. Mainwaring*, 3 Bro. 3 Gwn. 1199. See also *Cartwright v. Ch. C. 217.*
^a *Colton, E. T. 19 G. 3. 4 H. Wood's S. 6.*
^b *D. 28. Att. G. v. Cholmley, Amb. Per Curiam, Dyer, 170. b. in marg.*
 510. S. P. 7 Bro. P. C. 34. *Tomlin's ed. S. C. D. P.*

derstood, by the opinion and judgment of the common law, to be ground whereof no profit arises or grows; but ground which has been stubbed, and afterwards bears corn or grass, is not barren. By *waste ground* is understood such ground as no man challenges as his own, or no man can tell to whom it certainly belongs, and which lies unenclosed and unbounded with hedge and ditch; but the ground which is enclosed and hedged and ditched in, and the land known, is not waste ground. By *heath ground* is to be understood, ground which is dispersed and lies as common.

This fifth clause was designed for the advancement of tillage, and consequently, although the land yield some fruit, yet if it be barren land, *quoad agriculturam*, it is within this statute^d. On the other hand, if the land be not *suapte natura sterilis*, but is capable of producing a crop of corn, without extraordinary expense in the tillage, it is not protected by the statute. Such lands only are within this clause, as, over and above the necessary expense of enclosing and clearing, require also expense in manuring before they can be made proper for agriculture (11).

In a case where it appeared^d that the land had been marsh and sandy land, and covered with salt water, that from time immemorial no grass had been known to grow thereon, and no profit had been made of it, until the tenant, at a great expense, by the erection of banks and sea-walls, prevented the sea from overflowing the land, and thereby was enabled to convert it into arable land, which produced corn: it was holden, that this land was not protected by the statute; Coke C. J., Dodderidge, and Haughton Js. observing, that land was not barren which could bear corn without cost, as this did, and therefore tithes ought to be paid for it; and that the circumstance of the party having been at great costs in raising a mound to make this good land, by the exclusion of the sea, would not alter the case (12).

c 2 Inst. 656.

d Witt v. Buck, 3 Bulst. 166. 1 Roll. Rep. 364. 8. C.

(11) Barren ground is such ground as will not bear corn of itself, without very great cost in the extraordinary manuring of it. Agreed per cur. 3 Bulst. 166.

(12) This case is alluded to by Lord Hardwicke C. in Stockwell v. Terry, 1 Vez. 117. "There is an expense in gaining land from the sea, yet the seven years are not allowed, though overflowed time out of mind, because the benefit is lasting; but if an addi-

Land, the tithe of which was demanded^e, was part of a common adjoining to the town of Caermarthen, belonging to the burgesses, formerly lying open, and depastured by cattle and geese, which in the year 1785 was enclosed and converted into tillage. One end of it was wet, and there was a considerable expense incurred in draining, as well as in enclosing. In the spring of 1785 it was partly sowed with oats, and without any manure produced a valuable crop. It was holden that this land was not protected by the statute, not being *suapte natura sterilis*, and consequently should pay tithe immediately: *Eyre C. B.* observing, that enclosure was essential, in some situations, to the enjoyment in severalty, without being essential to the fertility. Draining might be a great improvement, might render land more productive, which would be of itself productive without draining. It was not, therefore, because a great expense was incurred by enclosing and draining land without more, that such land should be protected by the statute. If land will bear a crop of corn without expense in tillage, this circumstance is decisive that the land is not *suapte natura sterilis*.

The land in question was a hollow parcel of ground, surrounded by banks^f; the uneven or banky part was of little or no value, and produced briars only, the flat part was boggy, wet, and deep, so that cattle could not go upon it without great danger of being lost; when it was drained, and ploughed and sown, the same could not be harrowed by horses or cattle, but the occupier was obliged to employ men to harrow; the uneven or banky part was not capable of being ploughed without its being first dug; the crops produced during the years for which the plaintiff claimed tithe were so bad, and the profits arising from the cultivation had fallen so much short of the money expended, that

^e *Jones v. Le David*, H. 31 G. 2. Scacc. ^f *Byron v. Lamb*, in Ch. 4 Gwm. 1594. [*Eyre's MSS.*] 4 Gwm. 1336.

tional expense is necessary to make it produce the first crop, seven years shall be allowed."

"As to the case of land newly gained from the sea, if that determination can be supported at all, it must be by other reasons than those assigned in the book. If such land is not protected, it must be because it is not within the description in the statute; because it is neither barren, nor waste, nor heath ground, but from the moment of its existence as land, is fertile, enclosed, and capable of tillage, and therefore of a description which the statute cannot attach upon." Per *Eyre C. B.* in *Jones v. Le David*, 4 Gwm. 1338, 9.

it would not be possible for the defendant to be reimbursed for the same in twenty years. *Eyre B.*, sitting for the chancellor, held that this was protected by the statute.

In a case where it appeared, that an ancient warren and sheep-walk of 107 acres, in which were some furzes, had been ploughed and densed, and produced a crop of the value of 240*l.*^s; it was holden, that the land was not *suapte natura* barren, but profitable land.

See the like determination as to a common field for sheep, &c. which had been overrun with brushwood, briars, and other weeds^a.

So where a wood had been stubbed and grubbed upⁱ, and made fit for the plough, and employed to the purposes of arable land, it was holden, that it should pay tithe presently^j, for wood ground is *terra fertilis et fecunda*.

Of the Persons to whom Tithes are due.

Primâ facie all tithes not appropriated belong to and are due to the rector of the church of that parish wherein they arise. But the parson of one parish may claim by prescription a portion (13) of tithes in the parish of another^k.

Extra-parochial tithes belong to the king^l, who is a mixed person^m, and capable of tithes at the common law in perannuityⁿ.

Antecedently to the statutes for the dissolution of monasteries, spiritual persons only, or a mixed person, had capacity to take tithes; mere laymen were incapable of them^o, except in special cases, as in the case of *Pigot v. Heron*^p, Cro. Eliz. 599. 785. cited in 2 Rep. 45. a. where it was adjudged, that a lay person, owner of a manor, might

g *Bourneough v. Aston*, per Dolben J. 1698. Bull. N. P. 191.

h *Stockwell v. Terry*, 1 Ves. 115.

i Res. H. 9 Jac. C. B. 2 Inst. 656. See also Bunb. 159. Anon. Freem. 334.

k 14 H. 4. 17. a. 44 Ass. pl. 25. 1 Rol. Abr. 657.

l 22 Ass. pl. 75. 2 Inst. 647. 1 Roll. Abr. 657.

m 10 H. 7. 18. a.

n 2 Rep. 44. a. Cro. Eliz. 512. per cur. in *Banister v. Wright*, Sty. Rep. 137.

o Adm. in *Doe v. Landaff*, 2 N. B. 508. p. M. 39 & 40 Eliz. B. R.

(13) Portions are the remains of those arbitrary consecrations of tithes which took place before the settlement of the parochial right of tithes. The precise time at which the parochial right of tithes was settled cannot be ascertained; according to Sir Simon Dugge, it was settled by a perpetual constitution early in the thirteenth century.

prescribe that he and all those whose estate he had in the manor of Dale, in Dale, from time whereof, &c. had paid to the parson of Dale, for the time being, a certain pension, yearly, for maintenance of divine service there, in satisfaction of all tithes within the same manor, and further prescribe in a que estate in respect of such pension, for all the tithes within the manor.

Since the statutes for the dissolution of monasteries^a, the tithes which were appropriated to the monasteries so dissolved, are become lay fee, and laymen are capable of them in pernaney, not quâ laymen, but as the derivatives of the ecclesiastical persons to whom they formerly belonged.

As laymen were incapable of having any tithes until the dissolution of the monasteries, there cannot be any ancient descent with respect to tithes.

A rectory in Kent^t, formerly belonging to one of the dissolved monasteries, having been granted by Henry VIII. to a layman, to be holden in fee by knight's service *in capite*; it was adjudged, that although the lands were descendible according to the custom of gavelkind, yet the tithes must descend to the eldest son, according to the rules of descent at the common law.

If the parson lets his glebe for years^r, reserving a rent, the lessee shall pay him tithes.

A rector is of common right entitled to all kind of tithes, the vicar can claim against the rector, by endowment only; or prescription and usage, as evidence of endowment.

Where there is not any written endowment^q, and the vicar has been in the perception of all the small tithes, the court will presume him entitled to all small tithes of modern introduction.

By whom and against whom an Action on the Statute may be brought.

This action may be brought by the rector^t, or by one or more^r farmers of the rectory.

If the rector be entitled to two parts, and the vicar to a third part of the tithe, and the parson and vicar, by several leases, demise their respective shares to a third person, such

^q Cro. Eliz. 512.

^r Doe d. Lushington v. Bp. of Landaff and others, 2 N. R. 491.

^s Owen, 39.

^t Payne v. Powlett, E. T. 23 G. 2. Scacc. 3 Gwm. 1247.

^u Day v. Peckwell, Moor, 914.

^x Kent v. Penkeven, Cro. Jac. 70.

lessee may maintain an action for not setting forth *all* the tithes^y.

The right to tithes accrues immediately on the severance, consequently this action must be brought by the person entitled to the tithes at the time of severance.

Hence, where A. executed a lease of tithes to B. on a day subsequent to their severance, but before the tithes were carried away by the occupiers of the land, it was adjudged that B. could not maintain an action on this statute^z.

The action can be brought by the party grieved only; hence where this action was brought by the plaintiff for himself *and the queen*, judgment was arrested^a.

A man, being possessed of a lease of tithes in right of his wife, as executrix to her former husband^b, grants "all his right, title, and interest" in the aforesaid tithes to A. B.; it was holden that the grant was good, and that A. B. might maintain an action on this statute for not setting out tithes.

If executrix of lessee for years of a rectory take husband, the husband and wife may join in an action on this statute^c.

As the action on this statute is a personal action, tenants in common of tithe ought to join as plaintiffs^d; and if they do not join, advantage may be taken of it by plea in abatement, but not in arrest of judgment^e.

This action may be maintained *by executors*^f, for it is within the equity of the statute of the 4th Edw. 3. which gives to the executor an action of trespass *de bonis testatoris*; but will not lie *against* executors.

Generally^g, the person entitled to the nine parts at the time of severance, ought to set forth the tithe, and if he fails in so doing, the owner of the tithe may sue him, although his interest in the *land* be determined before the tithes were carried away, provided he remain owner of the *corn*.

If there be two joint-tenants^h, and one only enter and oc-

y Champernon v. Hill, Yelv. 63. Cro. Jac. 68.

z Wybard v. Tuck, 1 Bos. & Pal. 488.

a Johns v. Carne, Moor, 911. Cro. Eliz. 621., S. C.

b Arnold v. Bidgood, Cro. Jac. 318. recognized by De Grey C. J. in Thrustout v. Coppin, 3 Wils. 278.

Beadles and wife v. Sherman, Cro.

Eliz. 618. judgment affirmed on error.

d Greenwood's case, Chy't. 28.

e Cole v. Banbury, 1 Sidf. 49. See the post.

f Mr. J. Moreton's case, 1 Vent. 30. 1 Sidf. 407. 2 Keb. 502., S. C. 1 Sidf. 88. but see 1 Vernon, 60.

g Kipping v. Swayn, Cro. Jac. 324.

h Cole v. Wilkes, Hutt. 121.

copy, this action is maintainable against the joint-tenant, who occupied alone.

So if there be two tenants in commonⁱ, and one of them sets out his tithe, and the other carries it all away, the action shall be brought against that tenant in common alone who carried the whole tithe away.

If a person buy corn, standing, of the proprietor of a rectory^k, he must pay tithe, unless he has special words in the contract to discharge him from payment of tithe; and the carrying away such corn, without setting out the tithe, will render him liable to an action on this statute.

Of the Declaration.

It is not necessary for the plaintiff to set forth his title specially, because it is but inducement to the action; it is sufficient for him to allege generally, that he is rector, proprietor, or farmer, without shewing by what title^l; for this is a personal action, grounded merely upon a contempt against the statute, in not setting forth the tithes, and not for the recovery of the tithes, although the title to the tithes may come in question.

In an action by two farmers upon this statute, who claimed under a lease from a patentee for life of the king, an exception was taken; because they did not shew the patent^m, but the objection was overruled; 1st, because the letters patent did not belong to the plaintiffs; 2dly, because the plaintiffs did not demand the tithes themselves, but damages for a tort; and the title shewn in the declaration is only conveyance to the action.

Plaintiff declaredⁿ, that he was rector of A., and entitled to the tithes of certain lands, in the parish of A., and the tithes of certain lands in the parish of B., without shewing how he became entitled to the tithes of lands out of his parish; after verdict, this was holden sufficient.

So where plaintiff declared^o, that he was rector of D. and S., and that defendant, being occupier of lands in D. and S., carried off the corn untithed, without shewing which part of the lands lay in D. and which in S. After verdict for

ⁱ Gerard's case, cited and said to have been adjudged, Hutt. 129.

^k Moyle v. Ewer, Cro. Jac. 361.

^l Babington v. Matthews, Bulst. 228.

¹ Brownl. 86, 7. Moyle v. Ewer, Cro.

Jac. 362. Champernon v. Hill, Yelv. 63. S. P.

^m Dagg and Kent v. Penkevon, Exch. Chr. Cro. Jac. 70.

ⁿ Phillips v. Kettle, Hard. 173.

^o Fellows v. Kingston, 2 Lev. 1.

plaintiff, on motion in arrest of judgment, the declaration was holden sufficient, for this action is in the nature of a trespass founded in a tort.

So if the plaintiff declare^r, that he was seised in fee of a portion of tithes of corn growing upon such a grange, this will be sufficient.

Neither is it necessary to specify the kinds of grain^r, or by whom sown, or the number of loads of corn^r or hay carried away.

It is sufficient for the plaintiff to state in his declaration the single value of the tithes^r, without adding the treble value; and where the treble value is set forth, a mistake in computing it will not vitiate.

Where the severance was alleged to have been before the sowing^r, and exception taken on this ground, after verdict it was disallowed, because the allegation of the sowing was superfluous, and so aided by verdict.

Regularly, the declaration, pursuing the words of the statute, ought to allege, that the defendant is *subditus domini regis*; but to allege defendant to be *occupator terræ*, has been holden to be equivalent, for that implies that he is *subditus*^r.

It is not necessary for the plaintiff to set forth the title of the defendant^r; alleging generally, that he was occupier, without shewing how or what interest he had, will be sufficient.

Pleadings.

Nil debet is the general issue usually pleaded to this action^r, but it has been holden, that *not guilty*^r is also a good plea.

A discharge by a real composition must be pleaded specially^r.

Plea that the plaintiff sowed the corn, and sold it to the defendant, is not a good plea, because such sale will not excuse the payment of tithes^r.

p *Sanders v. Sandford*, Cro. Jac. 497.

q *Bodell and Wife v. Sherman*, 2 Inst. 650. 13 Rep. 47. 8 C.

r 1 Brownl. 71.

s *Coke v. Smith*, H. 7 Car. 1. B. R.

t *Pellett v. Henworth*, Degge, 398. 6th ed.

u *Phillips v. Kettle*, Hardr. 173.

x *March*, 21. pl. 49.

y *Bawtre v. Isted*, Hob. 218.

z *Johns v. Carne*, Cro. Eliz. 621. 2

Inst. 651. S. P. *Wortley v. Herpingham*, Cro. Eliz. 766. *Champernou v. Hill*, Moor, 914.

a 1 Lev. 185.

b *Moyle v. Ewer*, 2 Bulst. 183. Cro. Jac. 361. S. C.

The statute of limitations (21 Jac. 1. c. 16.) cannot be pleaded to this action^e, for that statute, s. 3., is confined to actions of debt grounded upon a lending or contract, *without specialty*, and to debt for arrears of rent.

Evidence.

Long possession, acquiesced in by the defendant^d, is *prima facie* evidence of the rector's title against defendant, and supersedes the necessity of proving institution, induction, or reading thirty-nine articles (14).

The plaintiff declared as farmer of the rectory of Friston, in Sussex^e, and proved himself lessee of J. S., who was lessee to the dean and chapter of Chichester, to whom the rectory belonged, and produced the lease from J. S., but did not produce the lease from the dean and chapter to J. S.; however, upon proving that he received tithe of others, as farmer, it was holden sufficient.

So where the plaintiff^f, being farmer under the dean and chapter of Canterbury, proved that he had received tithes for some years as such, it was holden sufficient, without producing any lease.

The plaintiff declared on a lease made to him for six

^e Talory v. Jackson, Cro. Car. 513. recognised in Cochran v. Welby, 1 Mod. 246.

^d Clayt. 48. pl. 83. See also Chapman v. Beard, T. 27 G. 3. Scacc. 4 Gwm.

1482. and Harris v. Adge, Scacc. T. 9 W. 3. 2 Gwm. 560.

^e Selwin v. Baldy, Bull. N. P. 188. per Pemberton, C. J. Sussex Ass. 1689.

^f Hartridge v. Gibbs, Bull. N. P. 198.

(14) "In penal actions on stat. 2 & 3 Ed. 6. it has always been holden sufficient proof against the defendant, that the party suing is in the act of receiving the tithes from defendant." Per Ld. Kenyon C. J. in Radford q. t. v. M'Lutosh, 3 T. R. 632. where it was holden, that in an action for penalties on the statute, laying a tax on post horses, brought by the farmer of the tax, it is not necessary for the plaintiff to give in evidence his appointment by the lords commissioners of the treasury, or the commissioners of the stamp duties authorized by them. Proof that the defendant has accounted with him, as farmer, for the duties, is sufficient. A lay impropriator is entitled to all the favourable presumptions to which a rector is entitled, both with respect to time and exemptions, and, consequently, if he prove himself impropriator, it will be sufficient, without proving the receipt of tithes within time of memory. Whieldon v. Harvey, H. 9 G. 2. Scacc. 3 Gwm. 951.

years by the parson^b, if the parson should so long live and *continue parson there*. The jury found the lease for six years, if the parson should so long live, but the words "if he continued parson" were not in the lease. The variance was holden to be immaterial, 1st, for the additional words in the declaration, "*if he should so long continue parson*," are only what the law implies; 2dly, because the lease is not the ground of the action, nor is the declaration founded upon the lease, but upon the carrying away the tithes.

The declaration stated^a, that "*the tithes of turnips were yielded and paid, and were of right due and payable within forty years next before the making the stat. Edw. 6.*" The second count contained a similar averment, as to the tithes of potatoes. After verdict for the plaintiff, it was moved to set it aside, on the ground that the averments were not, and could not, be proved, inasmuch as turnips and potatoes were not cultivated before the statute of Edw. 6. But the court said, that the true construction of the stat. Edw. 6. was, that if the lands charged were subject to the payment of tithe within the period mentioned in the statute, that was sufficient to prove the allegation in declarations of this kind, and to support the plaintiff's action; that if it were clear that nothing but wheat had ever been sown upon this land, still that would not preclude the tithe of other tithable produce from being taken, and that as no evidence had been offered at the trial to prove that turnips and potatoes were not cultivated previously to the stat. Edw. 6. they could make no such presumption against the justice of the case, even though such a fact might be asserted by persons who had written upon the subject. They added, that whatever might be the case with respect to potatoes, their own information led them to believe that turnips were in cultivation, in this country, before the stat. of Edw. 6.

The defendant, upon the general issue, may prove^c, that he duly set forth his tithes, but if he afterwards carried them away, such defence will not avail him; so if he sell his corn privately to another, and after selling it in that manner, cuts and carries it away, the action lies against the first owner; the same law is^d, where the owner of the land privately sells his corn to another, who privately cuts and carries it away.

Defendant, under the general issue of *nil debet*, may give

^a *Wheeler v. Heydon*, Cro. Jac. 328. ^k 2 Inst. 649.

^b *Hallewell v. Trappes*, East. T. 1806. ⁱ *Charry v. Garland*, Dorset Lent Ass.
2 Bos. & Pul. N. R. 173. 1699. *coram Ward C. B. s Gwm. 351.*

^c 1 Brownl. 34.

in evidence a *modus*, or customary payment, and thereby defeat the plaintiff's action.

The rankness of a *modus* is a question of fact, and not of law, and can be determined by a jury only^m.

If two farmers of tithe sue, and the defendant pleads *nil debet*, and upon trial proves an agreement with one of them only, this shall bind his companionⁿ.

Verdict.

If the verdict be given for the plaintiff^o, it is incumbent on the jury to find how much of the debt demanded by the declaration is due to the plaintiff, which is to be done by trebling the value of the tithe subtracted.

The plaintiff shall recover according to the verdict^p; hence, where, in the statement of the treble value of the tithe, there was error in the calculation, and the plaintiff demanded less than he was entitled to; on motion in arrest of judgment after verdict, an exception was taken, on the ground that the plaintiff, having demanded less than was due, ought to have acknowledged satisfaction for the residue; but the court overruled the objection, observing that the demand in this case was not for any sum certain, as in an action grounded on a specialty, but only for so much as should be given by the jury, the plaintiff being entitled to recover, not according to his demand, but according to the verdict.

It was found by a special verdict^q, that the abbot of A. was seised in fee of certain land, and that he and his predecessors held the land discharged of tithe, and that he had granted the land to All Souls College; it was holden, that the prescription was personal to the abbot, and did not run with the land, and that it could not be intended to be a discharge by a real composition, it not being so pleaded, nor found by the jury to be so.

In an action on this statute against several defendants, upon *nil debent* pleaded, the jury found for the plaintiff^r against one defendant only, and as to the others *nil debent*;

m Bedford v. Sambell, M. 16 G. 3. p Pemberton v. Shelton, Cro. Jac. 498.
 n Seacc. 3 Gwyn. 1658. (Ewells v. 2 Rol., R. 54. S. C.
 Welby, H. 20 G. 3. Seacc. 3 Gwyn. q Bolls v. Atkinson, 1 Lev. 185.
 1192. r Bastard v. Hancock, Carth. 361. re-
 n Moor, 915. cognised in Hardyman v. Whitaker,
 6 Degge, 6th ed. 404. B. R. M. 29 G. 2. cited in a note to
 Bedford v. Greeting, 2 East, 573.

upon motion in arrest of judgment, because it was an action of debt founded on a contract which is entire, the court held, that the action was founded on a tort, and not on a contract; *not guilty* would have been a good plea, and therefore a verdict may be given against one of the defendants, and for the others, as in actions upon torts.

An action on this statute, being brought by the party grieved for the purpose of trying a right, and being more beneficial to the defendant, than to be carried into the spiritual court, is not considered as a penal action brought by a common informer. Consequently, a new trial will be granted, where it is clear that the verdict has been given for the defendant against the weight of evidence^s; although, in penal actions, the courts will not permit a verdict to be disturbed on this ground^t.

Costs.

As to the costs, see the remarks on the second section, ante, p. 1134. and post. under tit. *Judgment*.

Judgment.

This being an action for the recovery of the treble value of the tithes, in a case where the single value was not recoverable at common law, did not fall within the stat. of Gloucester (15); the plaintiff, therefore, was not entitled to recover costs under that statute, consequently the judgment formerly was only for the debt^u found by the jury; and if the jury upon the trial had given costs and damages, it was incumbent on the plaintiff to enter a remittitur, and take judgment for the debt only^x; but an alteration has been made in this respect by stat. 8 & 9 W. 3. c. 11. which see ante, p. 1134.

^s *Holloway v. Hewett*, Trin. 13 G. 3. 10 MSS. Serjt. Hill, p. 339.
^t *Brook q. t. v. Middleton*, 10 East, 268.

^u Co. Ent. 162. a. 2d. ed.
^x See *Dagg v. Penkevon*, Cro. Jac. 70. where this mode was adopted.

(15) "Where a statute gives damages by creation, there the plaintiff shall recover no costs; the reason is, because damages being given out of course, and where the common law does not give them, and the statute being therefore introductive of a new law, the plaintiff shall recover what the statute appoints him to recover, and no more." Arg. Hardr. 152.

If judgment be for the plaintiff by *nil dicit*; *non sum informatus*, or upon demurrer¹, the judgment may be entered for the whole debt demanded by the declaration.

So if the issue be on a collateral matter², as on the custom of tithing or discharge by statute³, which is found against the defendant, and the defendant hath not taken the value by protestation, he shall pay the value expressed by the plaintiff in his declaration; for by the collateral matter pleaded in bar, the declaration is confessed in the whole.

If the action be brought against two or more defendants⁴, and a verdict is given against one or two only of the defendants, plaintiff is entitled to judgment against those, although there be a verdict for the other defendants.

It is expressly provided, that the statute of jeofails, 16 and 17 Car. 2. c. 8., shall extend to this action.

¹ Degge, 404.

² Coasterdam's case, cited in Yelv. 127.

³ Bowles v. Broadhead, Aleyn, 86.

⁴ Styles, 317, 318. See also ante, under Verdict.

CHAP. XXXVIII.

TRESPASS.

- I. *In what Cases an Action of Trespass may be maintained.*
 - II. *Where Trespass cannot be maintained.*
 - III. *Of the Declaration.*
 - IV. *Of the Pleadings:*
 1. *Of the General Issue, and what may be given in Evidence under it.*
 2. *Accord and Satisfaction.*
 3. *The Common Bar, or Liberum Tenementum.*
 4. *Estoppel.*
 5. *Licence.*
 6. *Process.*
 7. *Right of Way.*
 8. *Tender of Amends.*
 - V. *Costs.*
-

- I. *In what Cases an Action of Trespass may be maintained.*

THE land of every owner or occupier is enclosed and set apart from that of his neighbour, either by a visible and tangible fence, as one field is separated from another by a hedge, wall, &c. or by an ideal invisible boundary, existing only in the contemplation of law, as when the land of one man adjoins to that of another in the same open or common field. Hence every unwarrantable entry upon the land of another is termed a trespass by breaking his close.

The form of action which the law has prescribed for this injury is an action of trespass *vi et armis quare clausum fro-*

it, in which the plaintiff may recover a compensation in damages for the injury sustained.

Although the words of the writ are *quare clausum fregit*, yet it has been adjudged, in many instances where the plaintiff had not an interest in the soil, but an interest in the profits only, that trespass may be maintained, and this form pursued. Hence it was holden^a, that the grantee or patentee of the king de herbagio forestæ, might maintain trespass against any person who consumed or destroyed the grass, and that the writ should be *quare clausum fregit*. So where plaintiff is entitled to the vesture of land^b, that is, corn, grass, underwood^c, and the like. So where plaintiff had an exclusive (1) right of cutting turves in a moss, though the manor in which the moss was situate belonged to another^d.

So if it is agreed between J. S.^e and the owner of the soil, that J. S. shall plough and sow the ground, and that in consideration thereof, J. S. shall give the owner of the soil half the crop, J. S. may maintain trespass for treading down the corn (2). So if a meadow be divided annually among certain persons by lot, then after the several portion of each person is allotted, each is capable of maintaining an action of trespass *quare clausum fregit*, for each has an exclusive interest for the time^f.

Where trees are excepted in a lease, the land on which

a Dyer, 295. b. pl. 40.

b 1 Inst. 4. b.

c Moor, 355. pl. 483.

d Wilson v. Mackreth, 3 Burr. 1724.

e Welch v. Hall, per Powell J. at Wells, 1700. Salk. MSS. Bull. N. P. 85.

f See Cro. Eliz. 421.

(1) "To maintain trespass, it is essential that the plaintiff should have exclusive possession at the time of the injury committed. Hence *trespass* will not lie for entering into a pew or seat in a church, because the plaintiff has not the exclusive possession, the possession of the church being in the parson." Per Buller J. 1 T. R. 430. The proper form of action for this injury is an action of trespass on the case; to support which, the plaintiff must prove a right, either by a faculty or by prescription, which supposes a faculty having been formerly granted.

(2) In such case the owner is not jointly concerned in the growing corn, but is to have half after it is reaped, by way of rent, which may be of other things than money: although, in 1 Inst. 142, it is said, it cannot be of the profits themselves; but that, as it seems, must be understood of the natural profits. Bull. N. P. 85.

they grow is necessarily excepted also; consequently if the tenant cut down the trees, the landlord may maintain trespass for *breaking his close* and cutting down the trees^a.

Where two adjacent fields are separated by a hedge and ditch, the hedge *prima facie* belongs to the owner of the field, in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership^b. The rule about ditching is this: a person, making a ditch; cannot cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land, and often, if he likes it, he plants a hedge on the top of it; therefore if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser: no rule about four feet and eight feet has any thing to do with it (3). He may cut the ditch as much wider as he will, if he enlarges it into his own land.

The plaintiff, on the 6th of June, 1804^b, agreed with the defendant for the purchase of a standing crop of mowing grass, then growing in a close of defendant's. The grass was to be mowed, and made into hay, by the plaintiff; but the time at which the mowing was to begin was not fixed. Possession of the close was retained by the defendant. Before the plaintiff had done any act towards carrying the agreement into effect, the defendant refused to complete the agreement, and sold the grass to another person, whom he directed to cut and carry away the same. Trespass *quare clausum fregit* was brought, stating in the declaration that the close was in the possession of the plaintiff. Lord Ellenborough C. J. said, that as the plaintiff appeared to have been entitled (if entitled at all under the agreement stated) to the exclusive enjoyment of the crop growing on the land, during the proper period of its full growth, and until it was cut and carried away, he might, in respect of such ex-

^a *Rolls v. Rock*, Somerset Summ. Ass. i Per Lawrence J. in *Vowles v. Miller*, 2 Geo. 2. per Probyn J. MSS. 3 Taunt. 128. ^b *Per Bayley J.* in *Guy v. West*, Somerset Summ. Ass. 1808. ^c *Per Taunt.* 128. ^d *Per Taunt.* 128. ^e *Per Taunt.* 128. ^f *Per Taunt.* 128. ^g *Per Taunt.* 128. ^h *Per Taunt.* 128. ⁱ *Per Taunt.* 128. ^j *Per Taunt.* 128. ^k *Per Taunt.* 128. ^l *Per Taunt.* 128. ^m *Per Taunt.* 128. ⁿ *Per Taunt.* 128. ^o *Per Taunt.* 128. ^p *Per Taunt.* 128. ^q *Per Taunt.* 128. ^r *Per Taunt.* 128. ^s *Per Taunt.* 128. ^t *Per Taunt.* 128. ^u *Per Taunt.* 128. ^v *Per Taunt.* 128. ^w *Per Taunt.* 128. ^x *Per Taunt.* 128. ^y *Per Taunt.* 128. ^z *Per Taunt.* 128. ^{aa} *Per Taunt.* 128. ^{ab} *Per Taunt.* 128. ^{ac} *Per Taunt.* 128. ^{ad} *Per Taunt.* 128. ^{ae} *Per Taunt.* 128. ^{af} *Per Taunt.* 128. ^{ag} *Per Taunt.* 128. ^{ah} *Per Taunt.* 128. ^{ai} *Per Taunt.* 128. ^{aj} *Per Taunt.* 128. ^{ak} *Per Taunt.* 128. ^{al} *Per Taunt.* 128. ^{am} *Per Taunt.* 128. ^{an} *Per Taunt.* 128. ^{ao} *Per Taunt.* 128. ^{ap} *Per Taunt.* 128. ^{aq} *Per Taunt.* 128. ^{ar} *Per Taunt.* 128. ^{as} *Per Taunt.* 128. ^{at} *Per Taunt.* 128. ^{au} 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clusive right, maintain trespass against any person doing the acts complained of, according to the authority of 1 Inst. 4. b. Fitz. Abr. Tres. 149., and Bro. Abr. Tres. 273., and Wilson v. Mackreth, 3 Burr. 1826. But the court were of opinion, that, as the agreement was by parol, it was competently discharged by parol while it remained executory, and that on this ground the plaintiff was not entitled to recover.

The action of trespass *quare clausum fregit* is a local action. Hence, where trespass was brought for entering the plaintiff's house in Canada, it was holden that the action could not be maintained; Buller J. observing, "it is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the courts, that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here, which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local."

The action of trespass *vi et armis* is termed a possessory action, to distinguish it from those actions in which the plaintiff must shew a title. Being founded on an injury to the possession, it is essential that the plaintiff should be in the possession of the close at the time when the injury is committed; but as against a stranger or wrong doer, it is immaterial whether such possession be founded on a good title or not*. Even a tortious possession will support trespass against a wrong doer.

The plaintiff declared in trespass upon his possession; defendant made title, and gave colour to the plaintiff; plaintiff replied *de injuriâ suâ propriâ*, and traversed the title set out by the defendant; and upon demurrer, on the authority of Goslin v. Williams, P. 5 Geo. 1., the court held this a good replication; for it lays the defendant's title out of the case, and then it stands upon the plaintiff's possession, which is enough against a wrong doer, and the plaintiff need not reply a title.

In like manner it was holden*, that plaintiff, in possession of glebe land under a lease, void by stat. 13 Eliz. c. 20. by reason of the rector's non-residence, might maintain trespass against a wrong doer (4).

* 1 Doublon v. Matthews and another, 11 C. & F. 111; 11 East, 70; n. 4 T. R. 503. n Cary v. Holt, Str. 1233; 11 East, 70; n. o Graham v. Peat, 1 East, 244.
* See Dent v. Oliver, Cro. Jac. 123.

(4) But in such case, a rector may recover in ejectment against his lessee. Frogmorton v. Scott, 2 East, 467.

By the common law, he that agrees to a trespass after it is done, is no trespasser, unless the trespass is done to his use or for his benefit, and then his agreement subsequent amounts to a command; for in this case, *omnis ratihabitio retrahitur et mandato equiparatur*.

Although every person has of common right a liberty of coming into a public market for the purpose of buying and selling^p, yet he has not of common right a liberty of placing a stall there, but he must acquire such liberty by a compensation, which is called stallage. Hence trespass may be maintained by the owner of the soil against a person who unlawfully places a stall in the market.

The authority of the preceding case was recognised in the *Mayor, &c. of Norwich v. Swann*, 2 Bl. R. 1117. where it was holden, that trespass would lie for setting tables in a market place for the sale of goods without leave of the owner of the soil.

The lord or owner of the soil may maintain trespass against a commoner^q, who is guilty of an entry on the common, for the purpose of chasing the conies there; for the commoner can justify an entry merely for the purpose of using his common.

Tenants in common ought to join in trespass *quare clausum fregit*, for if one tenant in common bring trespass *qu. cl. fr.* without his companion, it may be pleaded in abatement^r.

In trespass *vi et armis* for taking and carrying away goods, it is not essentially necessary that the plaintiff should, at the time when the act was done which constitutes the trespass, have the actual possession of the thing which is the subject matter of the trespass; it is sufficient, if he has a constructive possession in respect of the right being actually vested in him. Hence^s, if a lord be entitled to a waif and estray within his manor, he may before seizure maintain trespass against a stranger who shall take away the waif or estray; for the right is in the lord, and a constructive possession, in respect of the thing being within the manor of which he is lord. So an executor^t has the right immediately on the death of the testator, and this right draws after it a constructive possession from the time of the death of the testator.

If a man gives me his goods^u, which are at York, and

^p *Mayor, &c. of Northampton v.* 5 F. N. B. 91. b.

Ward, 2 Str. 1239. 1 Wils. 107.

^t *Fisher v. Young*, 2 Bulstr. 268.

^q *Hadesden v. Gryssell*, Cro. Jac. 195.

^u *Bro. Abr. Trespass*, pl. 303.

^r *Comyns' Dig. Abatement* (E. 10.)

before I have possession a stranger take them, yet I shall have trespass; because by the gift the property is in me, to which the law annexes possession.

The owner of a piece of land granted liberty to A.² and his heirs to build a bridge on his land, and A. covenanted to build a bridge for public use, to keep it in repair, and not to demand toll. The bridge was built by A. of materials purchased at his expense; part of the materials of the bridge having been taken away by a wrong-doer, it was holden, that the public had only a licence to make use of the materials while they formed part of the bridge for the purpose of passage; and when they ceased to be part of the bridge, A.'s original property in them reverted to him, discharged of the right of user by the public, and consequently that A. might maintain trespass for the *asportavit* against the wrong doer.

In like manner, if the owner of land builds houses³, and marks out a street, and assigns part of the land as a public highway; this will not be considered as a transfer of the absolute property in the soil, so as to prevent the owner from maintaining trespass for an injury to the soil, e. g. for placing the end of a bridge thereon.

An action of trespass lies against any person who gleans on another's ground after harvest⁴: for a right to glean cannot be claimed by any person at common law. Neither have the *poor* of a parish *legally settled* such right.

In trespass for taking and carrying away a dead hare⁵, it appeared in evidence that the plaintiff, a farmer, being out hunting with hounds of which he had in part the management, and actually had such management at the time, though the hounds belonged to other persons, the hounds put up a hare in a third person's ground, and followed her into a field of the defendant, where, being quite spent, she run between the legs of a labourer who was accidentally there, where one of the dogs caught her, and she was taken up alive by the labourer, from whom the defendant immediately afterwards took the hare and killed her. Shortly after the plaintiff came up, and claimed to have the hare as his own; but the defendant refused to give it up, and questioned the right of the plaintiff to be where he then was. The labourer swore that when he took the hare from the

¹ *Harrison v. Parker*, 6 East, 154.

² *Lade v. Shepherd*, Str. 1004.

³ *Steel v. Houghton and Wife*, per *Ld.*
Loughborough C. J., Heath J., and

Wilson J.; dissentiente Gould J.
1 H. Bl. 51.

⁴ *Churchward v. Studdy*, 14 East, 249.

dogs, he did not mean to take it for his own use, but in aid of the hunters. The case of *Sutton v. Moody*^b was referred to, where it was said by Holt Ch. Ju., that "if A. start a hare in the ground of B., and hunt and kill it there, the property continues all the while in B.; but if A. start a hare in the ground of B., and hunt it into the ground of C., and kill it there, the property is in A., the hunter; but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C." And Chambre J. thought that this evidence sufficiently established the plaintiff's property in the hare; and the jury found a verdict for the plaintiff, with forty shillings damages. The court of B. R. afterwards concurred in his opinion, Lord Ellenborough C. J. observing, "that he did not understand at the time when the rule was granted, that the plaintiff, through the agency of his dogs, had reduced the hare into his possession; that makes an end of the question. Even though the labourer had first taken hold of it before it was actually caught by the plaintiff's dogs; yet it now appears that he took it for the benefit of the hunters, as an associate of them, which is the same as if it had been taken by one of the dogs. If indeed he had taken it up for the defendant, before it was caught by the dogs, that would have been different; or even if he had taken it as an indifferent person, in the nature of a stakeholder."

II. *Where Trespass cannot be maintained.*

If the entry be warranted by law, it is not a trespass. Such is an entry to demand rent due for the enjoyment of the land, to take and carry off tithes after they have been set forth, or to distrain for rent arrear or damage feasant. So a person may justify the following a fox with bounds over the grounds of another, if there be not any further injury committed than is absolutely necessary for the killing the fox^c.

One tenant in common cannot bring an action of trespass against his co-tenant, because each of them may enter and occupy in common, &c. *per my et per tout*, the lands and tenements which they hold in common^d.

So if from the finding of the jury it appear to be a te-

^b 1 Ld. Raym. 950. and 2 Salk. 556.

^d Litt. Sec. 393.

^c *Cundry v. Feltham*, 1 T. R. 34.

nancy in common^e, judgment shall be given for defendant, although the issue be found against him.

Bargainee cannot maintain trespass before entry and actual possession^f.

If A. make a lease for years^g, excepting the trees, the lessor may enter to shew the trees to a purchaser, and the lessee cannot bring trespass.

The plaintiff was the landlord of a house^h, which he let to A. ready furnished, and the lease contained a schedule of the furniture. An execution issued against A. under which defendant, as sheriff, seized part of the furniture, although notice was given to the officer that it was the property of plaintiff; plaintiff brought trespass. Adjudged per cur. that it would not lie.

Trespass will not lie by the assignees of a bankrupt against a sheriffⁱ for taking the goods of a bankrupt in execution, after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell.

If a ship be seized as forfeited under the navigation act^k, 12 Car. 2. c. 18. by a governor of a foreign country belonging to Great Britain, the owner cannot maintain trespass against the party seizing, although the latter do not proceed to condemnation; for by the forfeiture the property is divested out of the owner.

Trespass cannot be maintained for taking an excessive distress, where the distress is lawful, the whole being one entire act^l. Neither will trespass lie for an irregular distress, where the irregularity complained of is not in itself an act of trespass^m, but consists merely in the omission of some of the forms required in conducting the distress, such as not procuring goods to be appraised before they are sold (5).

^e Benington v. Do. Cro. Eliz. 157.

^f Admitted Lutwich v. Mitton, Cro. Jac. 604.

^g Liford's case, last resolution, 11 Rep. 52. a.

^h Ward v. Macauley and another, 4 T. R. 489.

ⁱ Smith v. Milles, 1 T. R. 475.

^k Wilkins and others v. Despard, 5 T. R. 119.

^l Lynne v. Moody, 2 Str. 851.

^m Messing v. Kemble, 2 Camp. N. P. C. 115.

(5) The true construction of the provision in 11 G. 2. c. 19. a. 19. that the party may recover a compensation for the special da-

Neither will it lie against an officer for taking goods or cattle by virtue of a replevinⁿ, unless a claim of property be made at the time when the officer comes to demand them.

If a person rated to the poor, object to the rate, *e. g.* because it is a prospective rate, he ought to appeal to the next sessions; and if he do not, he cannot maintain trespass against the overseers of the poor, who distrain on him for non-payment of the rate.

III. Of the Declaration.

Venue.—THE action of trespass *quare clausum fregit* is a local action, and consequently the venue must be laid in the county where the land lies; for otherwise the plaintiff, on the general issue, may be nonsuited at the trial; but trespass for taking goods is transitory, and the venue may be laid in any county, subject, however, to its being changed upon an application to the court, supported by the usual affidavit, if not laid in the county where the action arose.

ⁿ Per Holt C. J. in *Hallett v. Byrt*, o *Durrant v. Boys*, 6 T. R. 580. Carth. 361.

mage which he sustains by an irregular distress, “*in an action of trespass, or on the case*,” (see ante, p. 628,) is, that he must bring *trespass*, if the injury be a trespass; and *case*, if it be the subject matter of an action on the case. The nature of the irregularity must determine the form of action. Hence for an irregularity consisting in the omission to appraise the goods before they were sold, the action ought to be an action on the case. But where the party remained in possession of the goods in the plaintiff's house beyond the five days, and then removed the goods, it was holden, that trespass was maintainable; *Ld. Ellenborough* being of opinion, that the removal of the goods was a distinct, subsequent, and substantive act of trespass; and *Bayley J.* conceiving, that although the party was warranted in removing the goods, yet the action would lie for remaining in possession beyond the five days, that being a new act of trespass; and that damages might be given for such continuance, although the party was not a trespasser during the five days. *Ld. Ellenborough* observed, that he could not understand the statute as giving an option to maintain trespass, where trespass would not lie by the rules of the common law; but as giving an election to bring trespass, where trespass was the proper remedy, and case where case. *Winterbourn v. Morgan*, B. R. Trin. T. 1809. MS. 11 East, 395. S. C. See *Etherton v. Popplewell*, ante, p. 628.

The declaration ought to allege the commission of the fact directly and positively, and not by way of recital, *e. g.* for *that* on such a day the defendant broke and entered the plaintiff's close, and not for *that whereas*, &c.; an exception however, to the declaration for this fault must be made by special demurrer; because, though formerly in proceedings by bill the Court of King's Bench used to reverse the judgment on writ of error^r, or arrest the judgment on motion for declaring with a recital, yet now the court will permit the plaintiff even after verdict to amend the declaration by a right bill, the time of filing whereof the court will not inquire into^s. In proceedings by original, an objection on the ground of having declared with a recital cannot be sustained even on special demurrer^r, because the writ being set out in the declaration, the count-part of the declaration will be aided and made good by the recital of the writ^r.

Day.—It is not necessary to state the precise day on which the trespass was committed; it will be sufficient to insert any day before the commencement of the action.

Formerly, in order to avoid the necessity of bringing several actions, it was usual for the plaintiff, in cases where the nature of the trespass permitted it (6), to declare with a *continuando*, as it was termed, that is, that defendant on such a day committed certain trespasses (specifying them), *continuing the said trespasses* from such a day to such a day, *at divers days and times*; and if, as was generally the case, the declaration contained a charge for some acts which did not lie in continuance, as well as for some which did, then the continuing was expressly confined to those trespasses which did lie in continuance (7). This was the

^p *Brigs v. Sheriff*, Cro. Eliz. 507.
^q Str. 1161. 1162.

^r *White v. Shaw*, 2 Wils. 203.
^s *White v. Shaw*, 2 Wils. 203.

(6) Treading down and consuming grass, &c. with cattle, was considered as a trespass which lay in continuance; but taking a horse, killing a dog, cutting down a tree, and the like, being acts, which, when executed, could not be repeated, as they terminated upon the commission of them, were holden not to lie in continuance.

(7) See Co. Ent. tit. Trespass, pl. 4. where the declaration stated, that the defendant, on such a day, broke the close of the plaintiff, and eat up, trod down, and consumed the grass there growing, with cattle, and continuing the said trespass as to the eating up, treading down, and consuming the said grass from the day aforesaid until such a day, &c.

regular mode of declaring, but it frequently happened, through inadvertence, that the continuando was not so restrained, but was applied to all the trespasses by the general words *transgressiones predictas continuando*, in which case objections used to be made; but the courts, in order to prevent judgments being arrested on this ground, laid down a rule^t, that where several trespasses were laid in one declaration, some of which might be laid with a continuando, and some not, and the continuando, instead of being confined to such as lay in continuance, went to all, the court, after verdict, would restrain the continuando by intendment to those trespasses which might be laid with a continuando. So where the declaration^u charged the defendant with having taken, on a certain day, ten loads of wheat, ten loads of barley, and ten loads of oats, with a continuando of the said trespass, from the first-mentioned day to a subsequent day: on writ of error, it was assigned for error that the continuando was improper; but the court being of opinion, that several things being alleged which might be done at several times, although the trespass were laid on the first day, yet the continuando should make distribution thereof, that part was done at one day, and part at another, within the time declared of.

And in one case^x, where the plaintiff, in declaring against defendant for several trespasses, had confined the continuando to two trespasses, one of which ought not to have been laid with a continuando; it was holden, that although the plaintiff by this mode of declaring had precluded the court from aiding the declaration by the usual intendment, yet they would intend that the jury had not given any damages for the continuando (8).

^t *Gillam v. Clayton*, 3 Lev. 93. *Brook v. Butler v. Hedges*, 1 Lev. 210.
^u *Bishopp*, Salk. 639. ^x *Foutleroy v. Aylmer*, Ld. Raym. 233.

(8) It was admitted that this continuando would have been bad on demurrer. So, at the present day, if a declaration charges the defendant with having committed one entire individual act, e. g. an assault on such a day, and on divers other days and times between that day and the commencement of the suit, the declaration will be bad on special demurrer. *English v. Purser*, 6 East, 395. recognising *Michell v. Neal*, Cowp. 828.; but in such case, if, instead of the words "made an assault," the word "assaulted" be used, then the declaration will be good; because that may mean that the defendant committed so many different assaults on the different days. *Burgess v. Frelove*, 2 Bos. & Pul. 425. explained by *Ellenborough C. J.* in *English v. Purser*.

The form of declaring with a *continuando* has fallen into disuse, the language of the modern declarations being, "that defendant, on such a day, in such a year, and on divers other days and times, between that day and the day of the commencement of the suit, committed several trespasses." It will be perceived, that the principal object of the ancient and modern form is the same, viz. to comprehend several trespasses under one declaration. In substance, also, both forms are the same; but the modern form is more concise, and it is attended with this further advantage, that it does not afford any scope for those nice and subtle objections, which used to be raised on the difference between acts which lay in continuance and acts which did not (9). Still, however, care must be taken not to allege that defendant committed a single act, or an act which terminated in itself, on divers days and times, for that would be absurd, and afford just cause for special demurrer.

Although in trespass *quare clausum fregit* the plaintiff may declare generally without naming the close^a, yet, in trespass for taking goods, it has been uniformly holden, that the goods must be specified^a, and an omission in this respect will not be aided even by verdict^b.

The declaration must also state, that the land or goods were the plaintiff's land or goods; hence, if the words "of the plaintiff" or "his" be omitted, the declaration will be bad; but this omission may be aided by pleading over^c.

But in declarations for taking animals *feræ nature*, it must be stated, that the animals were either dead, tame, or confined; otherwise property in the plaintiff cannot be alleged; at least such allegation will be bad on demurrer.

In trespass for taking *duas damas ipsius* plaintiff in a cer-

y See *English v. Parson*, 6 East, 395. b *Wyatt v. Essington*, Str. 637. *Bertie v. Pickering*, 4 Burr. 2455.
ante, n. (s).
z 4 Bl. 4089. c See an instance of this kind in *Brooke v. Brooke*, 1 Sidf. 184.
a 5 Rep. 34. b.

(9) If by continuance, as applied to this subject, trespasses without any intermission were to be understood, it is scarcely possible to conceive many acts of which continuance, in this strict sense, could justly be predicated. Consuming and spoiling grass, &c. with cattle, which may be presumed to be levant and couchant on the land, day and night, is one instance, but it would be difficult to enumerate many more.

tain close of the plaintiff, called the park^d; on general demurrer, the declaration was holden to be bad, because a person cannot have property in deer, unless they are tame and reclaimed (10).

As to the necessity of alleging the trespass *vi et armis* and *contra pacem*, see ante, p. 29.

1. *Of the General Issue, and what may be given in Evidence under it.*

The general issue in this action is, *not guilty*.

In trespass *quare clausum fregit*, the defendant may, in all cases upon *not guilty*, give evidence of title^e, e. g. that the soil and freehold was his (11), or that the right of freehold was in J. S., and that defendant by his command entered, &c.^f. So a lease for years^g may be given in evidence under the general issue, but not a lease at will^h, for that is like a licence which may be countermanded.

By stat. 11 G. 2. c. 19. s. 21. "In actions of trespass brought against any persons entitled to rents or services of any kind, their bailiff or receiver, or other person, relating to any *entry* by virtue of this act, or otherwise, *upon the premises*, chargeable with such rents or services, or to *any distress*, or seizure, sale, or disposal of any goods or chattels

d Mallocke v. Eastly, 3 Lev. 227.

e Dodd v. Kyffin, 7 T. R. 354. Argent

v. Durrant, 8 T. R. 403.

f Gilb. Evid. 258. recognised by Law-

rence J. in Argent v. Durrant, 8 T. R. 405.

g Bro. General Issue, pl. 82.

h Ib.

(10) John Rough being convicted on an indictment for stealing a pheasant^{*}, value 40s. of the goods and chattels of H. S., all the judges, on a second conference, in Easter Term, 1779, after much debate and difference of opinion, agreed that the conviction was bad; for in cases of larceny of animals *feræ naturæ*, the indictment must shew that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add "of the goods and chattels" of such an one.

(11) Where *liberum tenementum* is given in evidence under the general issue, it is competent to the plaintiff to answer it by evidence of any matter which might have been pleaded by way of reply to the *plea* of *liberum tenementum*.

* Rough's case, Surrey Lent Ass. 1779. Bull. J. 2 East, P. C. 607.

thereupon, the defendants may plead the general issue, and give the special matter in evidence."

In a case where rent being in arrear¹, the tenant had removed his goods clandestinely from the demised premises, but the landlord had seized them as a distress within thirty days, as allowed by the preceding stat. 11 G. 2. c. 19. s. 1. it was holden, that to an action of trespass brought by the tenant against the landlord for such seizure, the defendant could not give the special matter in evidence upon the general issue by virtue of the preceding clause (s. 21); for that clause is confined to those cases where the distress is made upon the premises demised.

Where the defendant, or he under whom the defendant claims, does not claim the property and right to possession *in the soil*, but a particular benefit only, a profit *a prendre*, as a right of common², or an easement, as a right of way, (whether private or public³, is immaterial,) such claim ought to be pleaded specially, and cannot be given in evidence upon the general issue.

Trespass for nailing trees against the plaintiff's wall⁴; after not guilty pleaded, and verdict for the plaintiff, it appeared, on a case reserved, that the plaintiff was possessed of a green-house, the back wall whereof adjoined to the defendant's close, and that the defendant nailed the trees growing in his close, to the wall of the green-house, which was the absolute property of the plaintiff, and that the defendant had used so to nail his trees for 30 years last past, without interruption; it was insisted that this long usage was a possession of the back part of the wall in the defendant, though the property of the wall was in the plaintiff; but it was resolved, that this was no possession in the defendant, but an easement only, and could not be given in evidence upon the general issue; for whoever claims an *easement* must plead it specially (12): judgment for plaintiff, Gould J.

i Vaughan v. Davis, 1 Esp. N. P. C. 257. Rooke J. m Hawkins v. Wallis, C. B. Trin. 3 G. 3. 2 Wils. 173. Bac. Abr. tit. Trespass, (H) S. C.
k 1 Inst. 282. b: 283. a.
l Selman v. Courtney, Trin. 14 G. 2. C. B. Viner, Evidence, Z. a. pl. 91.

(12) "The long enjoyment in this case would perhaps have been evidence of a licence to nail fruit trees to the wall, in case a licence had been pleaded; but if this should be allowed to be evidence of such an actual possession of the wall in the defendant as to oust the plaintiff of his possession, it would tend to introduce a confu-

adding, "suppose the wall falls down, it being the plaintiff's property and fence next to the defendant's close; the plaintiff must rebuild it, or the defendant might have an action against him."

In trespass for taking goods^a: that defendant took the goods as a deodand must be specially pleaded, and cannot be given in evidence under the general issue.

2. Accord and Satisfaction.

Accord and satisfaction, being a good plea in all actions where damages only are to be recovered, is consequently a good plea in trespass^b; but a plea of accord, without satisfaction, cannot be supported. Hence, in trespass for taking cattle, it cannot be pleaded, that it was agreed "*that plaintiff should have his cattle again*," for this is no satisfaction for the injury done. So where to trespass for breaking and entering the plaintiff's close, the defendant pleaded "that in Easter term^c, in the 31st year of the present reign, the plaintiff declared against the defendant in this cause for the several trespasses above supposed by the defendant to have been done; and that afterwards, and before plea pleaded in this cause, to wit, on such a day, it was agreed between the plaintiff and defendant, in respect to an action then lately commenced between them, which was that day settled, as follows: that the defendant was to pay 1*l.* 1*s.* on account of the matter in dispute, and the plaintiff was to pay the law charges; and further, that whatsoever disputes then were, or had, or might be, in being, touching suits or actions, to the day of the date of the said agreement, should cease and terminate for ever; and they further agreed to bind themselves in the sum of 100*l.*, whoever should commence an action or suit, in respect to any thing in being to the then present day." It was then averred, that the present action, and the action in the agreement mentioned, were the same. On demurrer to this plea, it was contended, in support of the plea, on the authority of an admission in Reniger v.

^a *Dryer v. Mills*, Middx. Sitt. Parker p 1 Roll. Abr. 128. Accord (A), pl. 7.
^b C. J. 51. 61.
^c 9 Rep. 78. a. ^q *James v. David*, H. 33 G. 3. B. R. 5 T. R. 141.

sion of property; for it is the constant practice in all places for persons to nail fruit trees to the walls of their neighbours." Per Pratt C. J., S. C. *Bag. Abr. tit. Trespass, (H.)*

Foggeson, that the agreement, which is an effectual plea in bar, is either such an agreement as is executed and satisfied with a recompence in fact, or with an action or other remedy to execute it, and to recover a recompence; that here the parties agreed to bind themselves in the penalty of 100*l.* to abide by their accord; that, therefore, was a new remedy, which fell directly within the authority cited. But the court were of opinion that the plea was bad, Ashhurst J. observing, that "supposing the proposition were true, that whenever the agreement is such, for the breach of which an action might be maintained, [it may be pleaded in bar,] yet it is incumbent on the party pleading it, to shew that an action could have been supported on it. In order to found an action on this agreement, the plaintiff must have stated not only the agreement, but also that he tendered an obligation in 100*l.*, ready executed to the defendant, and that the defendant refused to execute, &c. but no action could have been sustained on this contract, without that previous step, which is not pleaded here."

3. *The Common Bar, or Liberum Tenementum.*

Formerly in trespass in C. B., and in proceeding by original in B. R., the writ which plaintiff sued out was a general writ of *quare clausum fregit* in A. Hence the declaration was general, it being a rule that the declaration ought to pursue the writ, and could not be extended beyond it. This imposed a hardship on the defendant, who was compelled to answer a general charge. To obviate this inconvenience, and to compel the plaintiff to ascertain with exactness the place in which he alleged the trespass, a method was devised of permitting the defendant to plead what is called the common bar, that is, to name a wrong place in the same vill, e. g. Broomfield, to which plaintiff had not any title, and then to allege (whether falsely or not was immaterial), that such place was the soil and freehold of the defendant. As the plaintiff could neither entitle himself to Broomfield, nor prove a trespass committed in it, he was obliged to new assign the *locus in quo*; that is, to ascertain it with exactness and precision, either by its name, or by metes and boundaries, or otherwise.

There were two other ways of pleading *liberum tenementum*, besides that before mentioned, 1st, generally, that the *locus* was the soil and freehold of the defendant; 2d, that

the *locus* was an acre of land, or a house, which was the soil and freehold of the defendant. These did not necessarily induce a new assignment, because if defendant had not any freehold in the vill, the plaintiff might traverse them with safety; but if defendant had a freehold in the vill, then it became necessary to new assign; for if plaintiff traversed the plea, it was sufficient for the defendant to prove that he had a freehold any where in the vill, and that would entitle him to a verdict^t.

If the defendant, in his bar, named the right place in which the supposed trespass had been committed, a new assignment was unnecessary, and the plaintiff traversed the plea; or, admitting the freehold to be in the defendant, insisted on a lease for years, or some other title under defendant^u, or under a stranger, who was seised antecedently to the defendant^v. If the writ and declaration were general, for breaking and entering several closes, and the plaintiff, upon the defendant's plea of *liberum tenementum*, new assigned the trespass, as to all the places, he could not traverse the defendant's plea; because such a traverse would have deprived defendant of an opportunity of answering the new assignment, which he was entitled to, the new assignment being in the nature of a new declaration. But if the plaintiff only new assigned one place, and as to the other places admitted them to be the same as those named in the plea, he might traverse the plea as to the places agreed upon^w. As the plaintiff in his new assignment averred, that the place newly assigned was another and different place from that named in the plea, he was considered as waving or abandoning the trespass which defendant had justified. The defendant, therefore, could not plead to the new assignment, that the place mentioned therein was the same as that named in the plea; if they were the same, the proper plea was *not guilty*; and then if plaintiff attempted to give in evidence, that the trespass was committed in the place named in the bar, the court would stop him; because by his new assignment he had waved the trespass in that place.

The prolixity which was introduced by general declarations, common bars, and new assignments, called loudly for a remedy. At length, in the year 1654, the following rules were framed:

^t *Helwis v. Lamb*, Saik. 453.

^u 5 H. 7. 10. a

^x *King v. Coke*, Cro. Car. 384. cited by Willes C. J. delivering the opi-

nion of the court in *Lambert v. Stroother*, Willes, 325.

^y Cro. Eliz. 619.

For the avoiding the common bar and new assignment^a, the declaration upon an original *quare clausum fregit* may mention the place certainly, and so prevent the use and necessity of the common bar.

The like rule was adopted in the Common Pleas^a at the same time, with respect to original writs or bills *quare clausum fregit*.

The common bar and new assignment shall be forborne, where the declaration contains the certainty equivalent to a new assignment^b (13).

Since these rules were made, the plea of *liberum tenementum*, as a common bar for the purpose of driving plaintiff to a new assignment, has gradually fallen into disuse (14); and as a plea for any other purpose, except for the purpose of compelling the plaintiff to set out his title specially on the record, it is not probable that it should maintain its ground much longer, since, in the late cases of *Dodd v. Kyffin*, 7 T. R. 364, and *Argent v. Durrant*, 8 T. R. 403., it has been solemnly adjudged, that soil and freehold in defendant may in all cases be given in evidence under the general issue.

To a plea of *liberum tenementum*^c, where the plaintiff replied, that the place in question was the soil and freehold of the plaintiff, and not the soil and freehold of the defendant, it was holden, on special demurrer, that the replication was good; for the words, "that it is the freehold of the plaintiff," were either to be rejected as surplusage, or to be considered only as inducement; that if the plaintiff had said, that it was his freehold, *absque hoc* that it was the freehold of the defendant, it would have been plainly an inducement only: and yet that was exactly the same case as the present, for there is not any distinction between traverses and denials.

Where the defendant pleads *liberum tenementum* in I. S.,

z B. R. M. 1654. s. 12.

a C. B. M. 1654. s. 17.

b S. 19.

c *Lambert v. Stroother*, Willes, 218.

(13) It must be observed, that these rules are only permissive; and not imperative; that is, they permit plaintiff to declare specially on a general writ, but if plaintiff chooses to adhere to the ancient mode of declaring generally on a general writ, he may. *Martin v. Kesterton*, 2 Bl. R. 1089.

(14) In *Lambert v. Stroother*, Willes, 224; Willes C. J. expressed a doubt whether *liberum tenementum* could be pleaded to a declaration, wherein the closes were named.

and that the defendant entered by his command, the plaintiff, in his replication, may traverse the command. This point was solemnly adjudged in *Chambers v. Donaldson*, B. R. E. 49 G. 3., 11 East, 65., (notwithstanding the case of *Witham v. Barker*, Yelv. 147., and the dicta in *Trevilian v. Pine*, Salk. 107. and ante, tit. Replevin, n. 21.) the court observing, that it had become a settled rule, that possession was sufficient to maintain trespass against a wrong-doer, but that this rule would be of no avail if the command were not traversable; for in that case the wrong doer might shelter himself under a plea of an outstanding freehold in a stranger, from whom he derived no authority to commit the trespass; and Bayley J. added, that it was not competent to a wrong-doer to call on a person in actual possession to set out his title.

The plaintiff had lands abutting on one side of a public highway, called Shepherd's Lane^d (which was *prima facie* evidence that half of the lane was his soil and freehold); it was holden, that he might declare generally for a trespass in his close, called Shepherd's Lane, and that it was incumbent on the defendant to plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property.

4. Estoppel.

If, in an action of trespass, a verdict be found on any fact or title distinctly put in issue, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect of the same fact or title.

To an action of trespass for digging and getting coals out of a coal-mine^e, alleged by the plaintiff to be within and under his close, called the Cow Close; the defendants pleaded, and shewed title regularly brought down to them in right of the wife, by fine, recovery, &c. from one Sir John Zouch, who in the 39th year of Elizabeth, was seized in fee of the manor of Alfreton, and of certain messuages and lands within the manor, by virtue of which title they claimed all the coals under those lands, except such as were within and under any of the messuages, buildings, orchards, and grounds, which, at the time of a recovery, suffered in the reign of Queen Elizabeth, were standing and being

^d *Stevens v. Whistler*, 11 East, 51.

^e *Outram v. Morewood and Ellen his wife*, 3 East, 346.

upon the said lands and tenements, and which coal mines, with the exception aforesaid, passed under a bargain and sale from Sir John Zouch to certain bargainees; and the defendant averred, that the coals in question were under the lands of that former owner, Sir J. Zouch, and were derived by bargain and sale to certain immediate bargainees, and from them to the defendant, the wife, and were not within or under any of the messuages, buildings, orchards, and gardens, which were the subject of the exception. To this plea the plaintiff replied, and relied, by way of estoppel, upon a former verdict obtained by him in an action of trespass, brought by him against one of the defendants, Ellen, the wife of the other defendant, she being then sole, in which he declared for the same trespass as now; to which the wife pleaded, and derived title in the same manner as now done by her and her husband, and alleged, that the coal mines in question, in the declaration mentioned, were, at the time of making the before-mentioned bargain and sale, by Sir John Zouch, parcel of the coal mines by that indenture bargained and sold: upon which point, viz. whether the coal mines, claimed by the plaintiff, and mentioned in his declaration, were parcel of what passed under Zouch's bargain and sale to the persons under whom the wife claimed, an issue was taken, and found for the plaintiff, and against the wife. The question was, whether the defendants, the husband and wife, were estopped by this verdict, and judgment thereupon, from averring in the present action (contrary to the title so there found against the wife), that the coal mines now in question were parcel of the coal mines bargained and sold by the before-mentioned indenture. It was holden, that the husband and wife were so estopped, and, consequently, that the plaintiff ought to recover.

5. Licence.

To an action of trespass, the defendant may *plead*, that he committed the supposed trespass by leave of the plaintiff.

Where a person is licensed to do an act, it is necessarily implied, that he may do every thing without which that act cannot be done.

Hence, where to trespass against A., B., and C., for breaking and entering plaintiff's house, and continuing there ten days, and selling divers goods; the defendants pleaded, that before the time, when, &c. the plaintiff licensed A. to

enter the house, and to continue therein for the sale of his goods, by virtue of which licence A., in his own right, and B. and C., as his servants, peaceably entered the house by the door, then open, to sell the said goods, and in and about the sale of goods, *necessarily continued in the house for ten days, &c.* concluding with a verification. On demurrer, it was objected, that the licence was personal to A., and, consequently, it could not justify the entry of any other person, and at least it ought to have appeared on the face of the plea, that the entry of the other defendants was necessary for the purposes mentioned in the licence. But the court overruled the objection, Willes-C. J. observing, that unless a man could sell goods to himself, it was absurd to contend that this was a licence to A. only to go into the house; besides, it was highly probable, that he might want to take several persons with him, in order to assist in the sale; and this is sufficiently set forth in the plea; for it is alleged, that all three *necessarily continued* in the house for ten days, to sell the said goods; and if their continuance therein were necessary, their entrance must certainly be so too, and was therefore sufficiently alleged (15).

Where the plaintiff complains of several trespasses committed on several days^a, and the defendant pleads a licence, to which the plaintiff replies *de injuriâ suâ propriâ absque tuâ causâ*; it is incumbent on the defendant to shew a licence for each act of trespass proved by the plaintiff. In such case it is not necessary for the plaintiff to new assign; for the meaning of the replication is, that the defendant committed the several trespasses without a licence for each.

Licence to enter and occupy land for a certain time amounts to a lease, and ought to be pleaded as such^b.

The defendant may also justify an entry into the house or land of another under a licence in law. Such is the entry

g *Barnes v. Hunt*, B. R. Trin. T. 1809. h Adm. per cur. 5 H. 7. 1. a. cited in 11 East, 451. Plowd. 549. a.

(15) In Hil. 13 Hen. 7. 13. the distinction is taken between those licences that are given for pleasure, and those for profit; that the former are merely personal, but that in the latter case, the person to whom the licence is given may take others with him; "Et issint si on me license a avoir un arbre in son bois, mes servants justifieront le sier del arbre et l'entrer." The former branch of this distinction is also supported by a passage in Finch's Law, 16 and 17, and the latter by a case in M. 13 Hen. 7. 10. Durnford's note, Willes, 197.

into an inn or tavern at seasonable times, an entry to demand rent due for the enjoyment of the land, or to distrain for the rent in arrear, or to distrain cattle damage feasant. Such also is an entry for the purpose of executing (in a legal manner) the process of the law; the entry of a remainder-man or reversioner to view the state of repair, and see whether any waste has been committed on the estate; the entry of a commoner to view his cattle, and the like. Having stated several instances in which the law permits a person to enter the house or land of another, we proceed to inquire in what cases a party shall be deemed a trespasser *ab initio*; as to which the following distinctions must be observed:

1. Where an entry, authority, or licence, is given to any person *by law*, and he abuses it by the commission of some act, there he shall be considered as a trespasser *ab initio*, i. e. from the first entry; for the law determines from the subsequent act, *quo animo*, or to what intent the original entry was made; as, if a person enters an inn or tavern and afterwards commits a trespass, by carrying away any thing, the law adjudges that he entered for that purpose, and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*; but, in such case, if the party is guilty of a mere non-feasance, as in the case of an entry into an inn, and refusing to pay for the liquor which he has consumedⁱ, there he cannot be considered as a trespasser *ab initio*, because a mere non-feasance does not amount to a trespass. So where one who has distrained a beast damage feasant, or taken an estray, kills or works it^k, he shall be deemed a trespasser *ab initio*; but a refusal to deliver the beast, on tender of amends, being a mere non-feasance, will not be considered as a trespass with force *ab initio*. It is clear, therefore, that in order to constitute a person a trespasser *ab initio*, the party must have been guilty of a subsequent act of trespass.

2. Where the entry, authority, or licence, to do any thing is given *by the party*, there although the person to whom the authority is given may, by the commission of subsequent acts, be a trespasser, yet such subsequent acts will not affect the original entry, so as to make that which was sanctioned by the authority of the party complaining, a trespass. In this case, therefore, the subsequent acts only will amount to trespasses.

ⁱ *Six carpenters' case*, 9 Rep. 146. a.

^k *Oxley v. Watts*, 1 T. R. 12

6. Process.

An officer cannot justify the breaking open an outward door or window¹, in order to execute process in a civil suit; but if he finds the outward door open, and enters that way, or if the door be opened to him from within, and he enters, he may break open inward doors, if he finds *that* necessary, in order to execute his process. And, as it seems², this rule holds, although the defendant be not in the house at the time; but in such case the officer must first demand admittance, and this demand must be pleaded (16).

A., an excise officer³, applied to the commissioners of excise for a warrant to search the house of B. The commissioners, being satisfied with the reasonableness of his suspicion, granted a warrant, empowering A. to enter the house of B., and seize all run tea which should be there found fraudulently concealed. A. accordingly entered B.'s house in the day time, and broke open a lock which B. had refused to open, and rummaged his goods, but did not find any tea. In an action of trespass brought by B. against the officer, it was holden, that upon the true construction of the stat. 10 Geo. 1. c. 10. s. 13. the officer was justified, although there was not any tea found, or any evidence given of the grounds of his suspicion.

In an action against a sheriff for breaking and entering plaintiff's house, and staying therein three weeks, the defendant pleaded a justification under process as to breaking and entering, and staying in the house twenty-four hours⁴. The plaintiff, admitting the writ, replied *de injuriâ suâ propriâ absque residuo causâ*. The defendants proved their justification; but it appeared that the officer continued in the plaintiff's house beyond twenty-four hours. Ld. Ellenborough was of opinion, that the plea applied to the whole declaration, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment. *The residue of the cause men-*

¹ Foster's Discourse of Homicide, chap. 8. s. 19.

² Ratcliffe v. Burton, 3 Bos. & Pul. 223.

³ Cooper v. Booth, B. R. T. 25 G. 3. on error from C. B. 3 Esp. N. P. C.

⁴ 135. in which Bostock v. Saunders, 2 Bl. R. 912. 3 Wils. 424. was overruled.

⁵ Monprivett v. Smith, 2 Camp. N. P. C. 175.

(16) For justifications under process of superior and inferior courts, see ante, tit. Imprisonment, p. 826—829.

tioned in the plea was alone put in issue, and the length of time, during which the officers remained in the house, was rendered immaterial.

7. Right of Way (17).

To trespass *qu. cl. fr.* the defendant may plead a right of way over the *locus in quo*, and that in the exercise of such right he committed the trespasses complained of.

There are four kinds of ways^p; 1. a footway; 2. a horseway, which includes a footway; 3. a carriageway, which includes both horseway and footway; 4. a driftway.

Although a carriageway comprehends a horseway, yet it does not necessarily include a driftway^q. It is said^r, however, that evidence of a carriageway is strong presumptive evidence of the grant of a driftway.

These ways are either public, or highways for all persons,^s or private ways (18).

An highway (termed in Law French *chimin*) is a way for all the king's subjects to pass and repass^t. It is called *regia via*, or the king's highway, although the king can only claim a passage for himself and his subjects; for the freehold and the profits growing there, as trees, and other things, are in the lord of the soil.

Where the owner of land builds houses upon it^u, forming a street, which he permits to be used as an highway, although an absolute transfer of the property in the soil cannot be presumed, yet a dedication of the way to the public will be presumed, so far as the public have occasion for it, for the purpose of passing and repassing along the same. But proof of a bar having been placed across the street^v, at

^p Inst. 56. d.

^q Ballard v. Dyson, 1 Taunt. R. 279.

^r Rex v. Chambre J., S. C.

^s Terms de la ley v. Chimiu, Bro.

Abr. Chimiu, pl. 9, 10, 11.

^t Lade v. Shepherd, Str. 1004.

^u Roberts v. Karr, Surrey Lent Ass.

1808. coram Heath J., 1 Camp. N.

P. C. 262.

(17) For right of common, see ante, tit. Common, and tit. Replevin, pleas in bar to avowry for damage feasant, p. 1073. For right of fishery, see ante, tit. Fishery, p. 743.

(18) "If a way leads to a market, and is a common way for all travellers, and communicates with a great road, it is an highway; but if it leads only to a church, to a private house, or village, or to fields, it is a private way. But this is matter of fact, and much depends on reputation." Per Hale C. J. Austin's case, Vent. 189.

the time when the street was made, even although such bar may have been subsequently destroyed, will rebut the presumption of a dedication to the public; for it must appear that the dedication was made openly, and with a deliberate purpose. N. There cannot be a partial dedication to the public, although there may be a grant of a footway only^x. Permitting the public to have the free use of a way in a street in London for six years, has been holden sufficient evidence of a dereliction, where no bar has been put up^y.

Trespass for entering plaintiff's close^z and pulling down a gate. Plea, that there was a public footway over the *locus in quo*, and because the gate was wrongfully erected across the same, the defendant pulled it down. It appeared in evidence, that the gate in question had been recently put up in a place where a similar gate had formerly stood, but where, for the last twelve years, there had been none. It was thereupon contended, for the defendant, that, from suffering the gate to be down so long, and permitting the public to use the way, without obstruction for so many years, the plaintiff, and those under whom he claimed, must be considered as having completely dedicated the way to the public, and that the gate could not be replaced. The plaintiff, however, had a verdict, which the Court of King's Bench, the following term, refused to set aside.

A private way is a right which one or more persons have of going over the land of another. This may be claimed either by grant, prescription, custom, by express reservation, as necessarily incident to a grant of land, or by virtue of an enclosure act.

1. *By Grant*.—A private way may be claimed by grant; as if A. grant that B. shall have a way from C. through such a close (belonging to A.) to M. So if A. covenants that B. shall enjoy such a way, it amounts to a grant^a.

Under the grant^b "of a free and convenient way in, through, and over a slip of land, leading from ——— to ———, with liberty to make and lay causeways, &c. and to use the same with carriages, and to carry coals, &c." the grantee has a right to make any such way as is necessary for the carrying that commodity, e. g. a framed waggon-way.

Under the grant of a way from A. to B.^c, in, through, and

^x S. C.

^y Per Lord Kenyon C. J. Trustees of Rugby Charity v. Merryweather, Middlesex Sittings, May 26th, 1790. 11 East, 376. n.

^z Lethbridge v. Winter, 1 Camp. N. P. C. 263.

^a 3 Lev. 303.

^b Senhouse v. Christian, 1 T. R. 369. ^c S. C.

along a particular way, the grantee is not justified in making a transverse road *across* the same.

If a person has a way through a close^d, in a particular direction, and he afterwards purchases other closes adjoining, he cannot extend the way to those closes.

In pleading a right of way under a grant, regularly there ought to be a *profert* of the deed; but if the deed has been lost^e "by time or accident," it may be so stated in the plea, and that will dispense with the necessity of a *profert*.

At common law, the right to repair is incident to the grant of a way^f.

A. granted to B.^g, his heirs, and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide (which divided those houses from a house then belonging to A.), the right of using the said piece of land as a foot or carriage way, and gave him "all other powers, &c. incident or necessary to the enjoyment of the way;" it was holden, that under the terms of this grant, the grantee was entitled to put down a flag-stone upon the piece of land in front of a door opened by him out of his house into this piece of land; Chambre J. observing, that the nature of the thing was material in considering the effect of the words. The way was granted for the occupation of a dwelling-house, and the grantee ought to have every thing needful for the occupation of his dwelling-house, he ought, therefore, to have the opportunity of repairing the way in such a manner, that it should not be wet or dirty, when he, or his family, or his visitors enter. If any inconvenience had been occasioned to the grantor, it might make a difference; but that was not the case here, nor was it to be feared that any right could hereafter be set up in respect of the soil, in consequence of this stone having been put down; for the precise extent of the road was pointed out.

A person having a *private* way over the land of another^h, cannot, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although such land, together with the land over which the way is, both belong to the grantor of the way (19).

^d 1 Rol. 391. 1. 50. 1 Mod. 190.

^e Read v. Brookman, 3 T. R. 151.

^f Sembl. 1 Saund. 323. Admitted per

Heath and Chambre Js. in 2 Bos. & Pul. N. R. 109.

^g Gerrard v. Cooke, 2 Bos. & Pul. N. R. 109.

^h Taylor v. Whitehead, Doug. 744.

(19) "Highways are governed by a different principle. They

2. *By Prescription.*—A private way may also be claimed by prescription^l, e. g. that defendant is seised in fee of a certain messuage, and that he, and all those *whose estate he has* in the said messuage, have, from time immemorial, had a footway, &c. (as the case may be) from ——— to ———.

From the words in italics, this plea is termed prescribing in a que estate. A right of way being an easement merely, and not an interest, it is not proper to lay the way as appurtenant or appurtenant^k.

If the defendant be a particular tenant, as tenant for years under a person who is entitled to a way by prescription for himself and his tenants, the plea must set forth the seisin in fee, the prescription, and the demise from the tenant in fee to the defendant, in conformity to the rule of pleading, that wherever a particular estate is pleaded, it must be shewn and derived from the fee^l.

Unity of possession of the land to which a way is appurtenant by prescription, and of the land over which the way is, will extinguish the way; for the prescription is gone, and the way is against common right^m.

As from an adverse enjoyment of a way for twenty years, or upwardsⁿ, a right by grant may be presumed, it is in many cases advisable to claim the way under a non-existing grant, as well as by prescription, lest proof of unity of possession, at some distant point of time, should destroy the title by prescription^o (20).

A claim of a prescriptive right of way from A.^p, over the defendant's close unto D., is not supported by proof that a close called C., over which the way once led, and which adjoins to D., was formerly possessed by the owner of close A., and was by him conveyed in fee to another person, without reserving the right of way, for thereby it appears that the prescriptive right of way does not, as claimed, extend unto D., but stops short at C.

^l Rastall's Entr. 617. pl. 5. ed. 2d.

^k Godley v. Frith, Yelv. 159.

^l Scilly v. Dally, D. P. Salk. 562.

^m Carth. 445. Ld. Raym. 331. Judgment affirmed on error: recognised in 3 Wils. 72.

ⁿ 1 Roll. Abr. 935. (C.) pl. 8.

^o Campbell v. Wilson, 3 East, 295.

^p See 3 T. R. 157.

^q Wright v. Ruttray, 1 East's R. 377.

are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line." Per Ld. Mansfield C. J., S. C.

(20) See ante, p. 1004, n. (3).

But where in trespass *qu. cl. fr.*^q the defendant prescribed for an occupation way from his own close "unto, through, and over" the locus in quo, to and unto a certain highway, &c., it was holden, that such plea might be sustained, though it appeared that one out of several intervening closes was in the possession of the defendant himself.

In trespass for breaking gates, and entering plaintiff's close^t, defendant proved a prescription to use a way in the locus in quo, for the inhabitants of Water-Eaton, *and other towns*, to go to Leighton and Woburn. The prescription in defendant's plea was for the inhabitants of Water-Eaton *only*. Probyn J.—"The proving more does not vitiate the prescription." Verdict for defendant.

Evidence of a prescriptive right of way for all manner of carriages, does not necessarily prove a right of way for all manner of cattle^u (21).

3. *By Custom*.—A custom that every inhabitant of such a vill shall have a way over such land, either to church or to market, is good, because it is but an easement, and not a profit.

A tithe-owner is entitled to make use of the road ordinarily used for the ordinary occupation of the close in which the tithe is taken^r, but he cannot justify carrying his tithes home by any other road, although the farmer himself may have used it for the occupation of his farm^s.

4. *By express Reservation*.—A right of way may be claimed by express reservation; as where A. grants land to another, reserving to himself a way over such land.

q. Jackson v. Shillito, Trin. 32 G. 3. s. Ballard v. Dyson, 1 Taunt. R. 279.
C. B. cited 1 East's R. 391. t. Admitted in Cobb v. Selby, 2 N. R.
r. Fountain v. Cook and others, Buck- 466.
ingham Sum. Ass. 1737. Serjt. Leeds' u. Adjudged, S. C.
MS.

(21) Extent of the usage is evidence of a right only commensurate with the use. Hence use of a way for carriages and pigs, is not proof of a right of way for oxen. Per three judges, S. C.; Chambre J. contra. "I have always considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved for a cartway. Consequently, although in certain cases a general way for carriages may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence; and they are to compare the reasons which they have for forming an opinion on either side." Per Sir J. Mansfield, S. C.

5. *For Necessity*.—If a person having a close, bounded on every side by his own land, grants the close to another, the grantee shall have a way to the close, as incident to the grant, or, as it is sometimes termed, a way of necessity; for otherwise he cannot derive any benefit from the grant^a.

If A. has four closes lying together, and sells three of them to B., reserving the middle close, to which A. has not any way, except through one of those closes which he sold, although he reserved not any way, yet A. shall have a way to the middle close, as reserved to him by operation of law^b.

J. S., as a trustee, conveyed land to another, to which there was not any way, except over the trustee's land; it was holden, that a right of way passed of necessity, as incidental to the grant^c.

If A., the owner of a close over which there is a right of way^d, plough up the way, and assign a new way, any person may justify using the new way as long as it lies open; but if A. afterwards stops up the new way, the removal of the obstruction to the new way cannot be justified, as will appear from the following case:

A., the owner of a close situate within a close belonging to B., had a prescriptive right of way through B.'s close to his own: twenty-four years before action brought, B. had stopped up this way, and made a new way, which had been used ever since, but latterly B. stopped up the new way; in an action brought by B. against A. for going over the new way, it was holden, that A. could not justify using this way as a way of necessity, but that he should either have gone the old way, and thrown down the enclosure, or brought an action against B. for stopping up the old way. The new way was only a way by sufferance during the pleasure of both parties, and A., by stopping it up, determined his pleasure.

Having detailed the several methods by which a party may entitle himself to a way over the land of another, it may not be improper to subjoin a few remarks relative to the form of pleading a right of way, and of replying thereto.

Pleading Right of Way.—In pleading a right of way, the defendant ought to shew the nature of the way, *i. e.* whether it be a footway, horse-way, or carriage-way; other-

^a 2 Keil. Abr. 60. pl. 17.

^y Per cur. in *Clarke v. Cogge*, Cro. Jac. 170.

^z *Howton v. Freeman*, 3 T. R. 50.

^a *Horne v. Widdlake*, Yelv. 141.

^b *Reignolds v. Edwards*, Willes, 222.

wise the plea will be bad, on demurrer^c; for uncertainty: this rule applies both to public and private ways; but in other respects, the form of pleading a public highway is more general than that of pleading a private way. Hence, it has been holden, that in a plea of a public highway, it is not necessary to state either the places from which and to which it leads^d, or that such way has existed from time immemorial^e. It is sufficient to state compendiously, that it is a public highway; but in pleading a private way, the *terminus a quo*, and *terminus ad quem*, ought to be set forth^f.

In replying to a plea of right of way, the plaintiff either admits the right, and new assigns, e. g. *extra viam*, or that the plaintiff has used the way in a different manner than that to which he was entitled; or he denies the right; and here it is to be observed, that in denying the right the plaintiff must adopt the form of a special traverse, in conformity to the rules of pleading, which do not allow the general traverse *de injuriâ suâ propriâ absque tali causâ* to be pleaded in cases where the defendant insists on a right^g; and which rule holds as well where the defendant justifies by command of another claiming the right, as where he insists on the right in himself^h.

To a plea claiming a right of way, the plaintiff may traverse the right, and give in evidence that the way had been stopped up by order of two J. P. under the stat. 13 G. 3. c. 78. s. 19. (22) and that defendant committed the trespasses complained of after the way was so stopped up.

c Alban v. Bronnsall, Yelv. 163.

d Rouse v. Bardin, 1 H. Bl. 351.

e Aspidall v. Brown, 3 T. R. 965.

f 2 Leon. 10.

g Ruishbrooke v. Pnsanie, 4 Leon. 16.

Crogate's case, 8 Rep. 66. b. Cooper

v. Monke, Willes, 54.

h Cockerill v. Armstrong, Willes, 99.

(22) By which it is enacted*, that "when it shall appear upon the view of two J. P. that any public footway, &c. may be diverted, so as to make the same nearer or more commodious to the public, and the owners of the lands through which such new footway, &c. is proposed to be made, shall consent thereto, by writing under their hands and seals, it shall be lawful, by order of such J. P. at special sessions, to divert and turn, and stop up such footway, &c. and to purchase the ground for such new footway, &c. in the manner, and subject to the exceptions and conditions prescribed in a former part of this statute, with regard to highways, to be widened or diverted. And where such footway, &c. shall be so or-

* Stat. 13 G. 3. c. 78. s. 19.

But to enable the plaintiff to avail himself of such an order, it must appear that the order has pursued the form prescribed in the schedule to which the enacting part of the

dered to be stopped up, and such new footway, &c. set out and appropriated in lieu thereof, any person aggrieved by such order, &c. may appeal to the next quarter sessions, &c. after such order made, upon giving notice, &c. which court is authorized to hear and finally determine such appeal. And if no such appeal be made, or being made, such order shall be confirmed by the court, the way may be stopped, and the proceedings thereupon shall be binding and conclusive to all persons, and the new footway, &c. shall be and for ever after continue a public footway, &c. to all intents and purposes; *but no stoppage of such footway, &c. shall be made, until such new footway, &c. shall be completed and put into good condition and repair*, and so certified by two J. P. upon view thereof, which certificate shall be returned to the clerk of the peace, and be by him enrolled among the records of the court; but after such certificate, such old footway, &c. shall and may be stopped up, &c." By s. 69. it is enacted, "That the forms and proceedings which are set forth and expressed in the schedule thereunto annexed, shall be used on all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case; and that no objection shall be made, or advantage taken, for want of form, in any such proceedings."

The schedule referred to (No. 21.) gives the following form of such order:

"Order of two justices for diverting and turning a public footway, &c. through the lands of any person who consents thereto.

"Middlesex.—We A. B. and C. D. esquires, two of his Majesty's J. P. for the said county, at a special sessions held at —, in the hundred of —, in the said county, on the — day of —, 18—, having upon view found that a certain part of a footway within the parish, &c. of —, in the same hundred, lying between — and —, for the length of — yards or thereabouts, and particularly described in the plan hereunto annexed, may be diverted and turned so as to make the same nearer or more commodious to the public; and having viewed a course proposed for the new highway in lieu thereof, through the lands and grounds of —, of the length of — yards or thereabouts, and of the breadth of — feet or thereabouts, particularly described in the plan hereunto annexed; and having received evidence of the consent of the said — to the said new highway being made through his lands herein-before described, by writing under his hand and seal, we do hereby order that the said highway be diverted and turned through the lands aforesaid, and we do order an equal assessment," &c.

19th section refersⁱ, e. g. the length and breadth of the new road must be set out in the order; otherwise the order will be bad, and advantage may be taken of the defect in a collateral proceeding.

And further, as by this section of the statute the J. P. have only jurisdiction conferred on them in a given case, viz. to *divert* an old road, so as to make it nearer or more commodious to the public, that is, by making a new road⁽²³⁾; it must appear, that a *new* highway has been made in lieu of the old highway; merely widening an old highway, by the addition of detached pieces of land adjoining to one side of it (the *termini a quo* and *ad quem*, and the direction of it, remaining the same as before,) will not be considered as diverting an old highway, or making a *new* highway within the meaning of the statute^k, and in such case, although the order of the J. P. be regular on the face of it, stating, that a new highway has been made in lieu of the old one, and although such order has been confirmed on appeal by the quarter sessions, yet it is competent to the defendant to prove that a *new* highway was not in fact made; for the J. P. cannot give to themselves a jurisdiction in a particular case, by finding that as a fact which is not really the fact.

8. Tender of Amends.

At the common law^l, if a person brought an action of trespass for taking away his beasts, or other goods, tender of sufficient amends before action brought was not a bar; because the party making the tender was not the owner of the goods, as in the case of a distress (24), but a trespasser to

i Davison v. Gill, 1 East, 64.

l 2 Inst. 107.

k Welch v. Nash, 8 East, 394.

(23) The power to shut up roads is given only where there is a new road to be set out. Page v. Howard, M. 23 G. 3. B. R. Cald. 223.

(24) With respect to distresses, either for rent arrear or damage feasant, the law is^{*}, that if a tender is made before the taking the distress, the taking is wrongful; if after the taking, and before impounding, the detainer is wrongful. But a tender, after impounding, comes too late. Hence, in pleading a tender of amends to an avowry for damage feasant, it ought to appear on the face of the plea, that the tender was before impounding. The clause in stat. 21 Jac. 1. c. 16. s. 5. hath not made any alteration in this respect, for that clause is confined to actions of trespass[†].

* 2 Inst. 107. † Allen v. Bayley, Lutw. 1596.

whom the law did not shew any favour. But now, by stat. 21 Jac. 1. c. 16. s. 5. "In all actions of trespass *quare clausum fregit*, wherein the defendant shall disclaim in his plea, to make any title or claim to the land, and the trespass be by negligence or involuntary, defendant may plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender of sufficient amends before action brought."

To this plea the plaintiff may reply a *latitat* sued out^m, with an intention to declare in trespass before the tender.

V. Costs.

THE statute of Gloucester having given costs in all cases where damages were recoverable, it followed as a necessary consequence, that wherever the smallest damages were recovered, the plaintiff obtained his full costs. This was productive of so much inconvenience, by encouraging vexatious suits, that the interposition of the legislature was deemed necessary, in order to confine the operation of the statute of Gloucester. For this purpose it was enacted by stat. 22 & 23 Car. 2. c. 9., that "in all actions of trespass, assault and battery (25), and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was proved, or that the freehold or title of the land mentioned in the plaintiff's declaration, was chiefly in question; the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover more costs of suit than the damages so found shall amount unto."

Notwithstanding the general words "other personal actions," this statute has been uniformly construed to be confined to the two species of actions therein specially named, viz. trespass, and assault and battery; and that the action of

^m Watts v. Baker, Cro. Car. 264.

n Salk. 308. Milburne v. Reade, 3 Wils. 323. per Willes, C. J.

(25) For the cases on this statute relating to assault and battery, see ante, p. 39.

trespass is confined to trespass *quare clausum fregit*, wherein the freehold or title to the land may come in question.

It may be laid down as a general rule, that all actions *quare clausum fregit*, wherein the plaintiff merely declares for an injury to the freehold, or to something growing upon^o, or affixed^d to the freehold, as breaking a lock affixed to plaintiff's gate^d, are within the statute. And this rule holds, although the declaration charges the defendant with taking and carrying away a portion of the freehold, provided such taking and carrying away be merely a mode or qualification of the injury done to the land.

In an action of trespass *quare clausum fregit*^d, it was stated in the first count, that the defendants broke and entered the close of the plaintiffs; and the grass of the plaintiffs, there then growing, with their feet in walking trod down, spoiled, and consumed, and dug up and got divers large quantities of turf, peat, sods, heath, stones, soil, and earth of the plaintiffs, in and upon the place in which, &c. *and took and carried away the same*, and converted and disposed of the same to their own use. There was another count, upon a similar trespass, in another close. The defendants pleaded the general issue to the *whole* declaration, and two special pleas to the *second* count; and on the trial, a verdict was found for the plaintiffs on the general issue with one shilling damages; and for the defendants on the special pleas, and the judge had not certified. It was holden, that the plaintiff was not entitled to any more costs than damages, Lord Mansfield C. J. observing, "What has been called an *asportavit*, in this declaration, is a mode or qualification of the injury done to the land. The trespass is laid to have been committed on the land by digging, &c. and the *asportavit* as part of the same act; and on the trial of the issue, the freehold certainly *might* have come in question. This is clearly distinguishable from an *asportavit* of personal property, where the freehold cannot come in question, and which, therefore, is not within the act; thus, after trees are cut down, and thereby severed from the freehold, if a trespasser comes and carries them away, that case is not within the statute, because the freehold cannot come in question; here it might."

So where the plaintiff declares for a consequential injury, merely as matter of aggravation.

o Hill v. Reeves, C. B. E. 3 G. 1. Bull. q Butler v. Cozens, 11 Mod. 199. 6 Vin.
N. P. 329. Abr. 357.
p Birch v. Daffey, C. B. Trin. T. 3 G. 1. r Clegg v. Molyneux, Doug. 779.
Bull. N. P. 330.

In trespass for breaking and entering a dwelling house², and making a great noise there, and continuing there until the plaintiff and another person were compelled to give a sum of money; it was holden, that the plaintiff was entitled to no more costs than damages.

In trespass for throwing stones³, &c. at the windows of plaintiff's house, and breaking the glass, &c. the damages being under 40s. and no certificate; it was holden, that the plaintiff was not entitled to any more costs than damages; because the defendant might have given *liberum tenementum* in evidence, and so the title to the house have come in question.

In cases like those above-mentioned, if it does not appear either by the certificate of the judge, or by the pleadings⁴, (for that is considered as tantamount to the judge's certificate) that the freehold or title *was* chiefly in question, the plaintiff is entitled to no more costs than damages, if he recover less than 40s.

Before the stat. 4 Ann. c. 16. s. 8. (allowing the court on motion to direct a view) there could not be a view until after the cause had been brought to trial, when, if the judge thought proper, the cause was adjourned to enable the jurors to have a view; and this was entered upon the record: whence the court inferred that the title must have come in question, and a view having been granted, was considered as tantamount to a judge's certificate⁵. But as since the statute of Ann, a view is granted of course upon the previous motion of either party, and may be granted where the title is not in question, the same effect cannot any longer be attached to it; and a plaintiff recovering less than 40s. is no longer entitled to costs of increase, merely because a view has been had, although it was granted upon the application of the defendant⁶.

If it appear on the face of the declaration, that the freehold might have come in question, it is sufficient to bring the case within the statute.

To trespass at A.⁷, and throwing down, burning, and totally destroying the plaintiff's hedge, there then erected, &c. whereby, &c.; the defendant pleaded the general issue, and justified as to the throwing down the hedge, because it was

² Appleton v. Smith, B. R. H. 2 G. 3. x Kempter v. Deacon, Ld. Raym. 764
Bull. N. P. 330. See also Blunt v. Salk 665.
Mither, Str. 645. y Flint v. Hill, B. R. E. 1809. 11 East,
t Adlem v. Grinaway, 6 T. R. 281. 184.
u Asser v. Finch, 9 Lev. 234. Martin z Stead v. Gamble, 7 East, 225.
v. Vallance, 1 East, 350.

erected on a common over which he prescribed for right of common, whereon issue was taken, and found for the defendant, and a verdict for the plaintiff, with 20s. damages on the general issue; it was holden, that the facts stated in the special plea and found, could not be taken into consideration, to shew that the title to the freehold could not come in question; and as, on the declaration, the freehold might have come in question, and the judge did not certify, the plaintiff was entitled to no more costs than damages.

The cases to which the statute does not apply are, 1. Where the action is brought solely for an injury to a personal chattel^a, 2. Where the action is brought for a local trespass, and also for a substantive and independent injury to a personal chattel (whether in the same^b count with the local trespass, or a different count^c, is immaterial), and general damages are given; in which case, as the court will intend that part of the damages were given for the injury to the chattel, as to which there cannot be any certificate, the case is as much exempted from the operation of this statute, as if the plaintiff had declared merely for an injury to a personal chattel. It may not be improper to observe, that in a case of this kind, if the plaintiff fails in proving the injury to the chattel^d, and there is a verdict for the defendant on this part of the declaration, the action then becomes merely an action for a local trespass within the operation of the statute.

On writs of inquiry, in cases within this statute^e, the plaintiff shall have full costs, although the damages are under 40s.

Where the cause originally began in an inferior court^f, and is removed into K. B. or C. B. the plaintiff shall have his full costs, although the damages are under 40s. and there is not any certificate.

It only remains to mention another class of cases, in which it has been holden, that wherever a special plea of justification is found against the defendant, the plaintiff is entitled to full costs.

To trespass *quare clausum fregit*^g, defendant pleaded *not guilty*, and a licence, on both of which pleas issue was joined,

^a Ven v. Phillips, Salk. 208. Keen v. Whistler, 1 Str. 534.

^b Anderson v. Buckton, 1 Str. 192. Thompson v. Berry, 1 Str. 551. Smith v. Clarke, 2 Str. 1130.

^c Barnes v. Edgard, 3 Mod. 39.
^d Salk. 209.

^e Sheldon v. Ludgate, C. B. T. 3 G. 1. Bull. N. P. 339.

^f Roop v. Scritch, 4 Mod. 378. Archbishop of Canterbury v. Fuller, 1 d. Raym. 305.

^g Redridge v. Palmer, 2 H. Bl. 2.

and found for plaintiff, with one-shilling damages; it was holden, that the plaintiff was entitled to full costs, it being a general rule, that *wherever a special plea of justification is found against defendant, plaintiff is entitled to full costs.*

The rule, as laid down in the foregoing case, was recognised in *Comer v. Baker*, 2 H. BL 341., and in *Peddell v. Kiddle*, 7 T. R. 659.

The principle on which these determinations are founded, is stated by Lord Kenyon, in the last mentioned case, to be this, that where the case is such that the judge who tries it cannot in any view of it grant a certificate *within the act*, it is considered to be a case out of the statute. It may be remarked, that the principle adverted to by Lord Kenyon is certainly a sound principle, but it is not quite so clear that the application of the principle to the cases in question was correct.

By stat. 4 & 5 W. & M. c. 23. s. 10., after reciting that great mischiefs ensue by inferior tradesmen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves, and damage of their neighbours, it is enacted, that "if any such person shall presume to hunt, hawk, fish, or fowl, (unless in company with the master of such apprentice, duly qualified by law) such person shall be subject to the penalties of this act, and may be sued for his wilful trespass in such his coming on any person's land; and if found guilty thereof, the plaintiff shall not only recover his damages, but full costs." It has been holden, that a clothier, who kept an alehouse, and was not qualified to kill game, was an inferior tradesman within the meaning of this statute^a, and liable to pay full costs, although he was hunting in company with a qualified person at the time when the trespass was committed. See further as to the construction of this statute, *Buxton v. Mingay*, 2 Wils. 70. where the court of C. B. were equally divided in opinion on the question, whether a surgeon and apothecary, not qualified, having committed a trespass in hunting with a qualified person, was "an inferior tradesman" within the meaning of the statute, Bathurst J. and Clive J. being of opinion that he was, conceiving that all unqualified tradesmen were "inferior tradesmen;" but Willes C. J. and Noel J. being of opinion that the defendant, merely as an apothecary and surgeon, was not to be considered as an inferior tradesman, or a dissolute person within the statute.

^a *Wickham v. Walker*, C. B. M. 11 G. 2. Barnes, 125.

By stat. 8 & 9 W. 3. c. 11. s. 4. "In all actions of trespass, wherejn, *at the trial of the cause*¹, it shall appear and be certified by the judge, under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was wilful and malicious, the plaintiff shall recover, not only his damages, but his full costs (26)."

In Reynold v. Edwards, 6 T. R. 11. it was holden, that if the trespass was committed after notice, the judge was bound to certify that the trespass was wilful and malicious. But in Good v. Watkins, 3 East, 499. it was adjudged, that, although the trespass were committed after notice, yet the statute meant to leave it to the discretion of the judge to certify or not, according as it appeared to him at the trial, upon view of all the circumstances proved, that the trespass was or was not wilful and malicious.

¹ See Ford v. Parr, 2 Wils. 21.

(26) See ante, p. 40, 41.

CHAP. XXXIX.

TROVER.

- I. *Of the Nature and Foundation of the Action of Trover, and in what Cases such Action may be maintained.*
- II. *By whom and against whom Trover may be maintained.*
- III. *The Declaration—Plea—Defence, and herein of the Doctrine of Liens—Evidence—Of staying the Proceedings—Costs—Judgment.*

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- I. *Of the Nature and Foundation of the Action of Trover, and in what Cases such Action may be maintained.*

DEFINITION.—The action of trover is a special action upon the case, which may be maintained by any person who has either an absolute or special property in goods, for recovering the value of such goods, against another, who having, or being supposed to have, obtained possession of such goods by lawful means, has wrongfully converted them to his own use.

In order to maintain an action of trover, it is necessary that it should appear,

1. That the plaintiff had either an absolute or a special property in the goods which are the subject of the action, at the time when they came into the possession of the defendant who has converted them:

2. That the plaintiff had also the right of possession in the goods:

3. That *personal* goods constitute the subject matter of the action:

4. That the defendant has been guilty of a wrongful conversion.

1. *Absolute Property*.—It must appear, that the plaintiff had a property^a, either absolute or special, in the goods which are the subject of the action, at the time when they came into the possession of the defendant who converted them; but it is not necessary to shew that the plaintiff had both an absolute and special property^b; either the one or the other is sufficient.

Absolute property is where one^c, having the possession of goods, has also the exclusive right to enjoy them, and which can only be defeated by his own act.

Trover was brought by a tenant in tail, expectant on the determination of an estate for life^d, without impeachment of waste, for timber which grew upon, and had been severed from the estate, and was in the possession of the defendant. It was holden, that the plaintiff could not recover; because an action of trover must be founded on the property of the plaintiff, and in this case the plaintiff had not any property in the timber; for a tenant for life, without impeachment of waste, has a right to the trees at the moment when they are cut down. In like manner tenant in tail, after possibility of issue extinct, is entitled to timber when cut^e.

So trustees of an estate *pur autre vie*, cannot maintain trover for trees felled upon the estate^f; for although they have a special property in the trees while standing, yet that property ceases when they are cut down, and the trees then belong to the owner of the inheritance.

In *Berry v. Heard*, Palm. 327. and *Cro. Car.* 242.^g it was for a long time in great doubt, whether the landlord had such a possession of timber cut down during the continuance of a lease, on which he could maintain trover; but it was finally determined that he had; because the interest of the lessee in the timber remained no longer than while it was growing on the land demised, and determined instantly upon the severance.

The owner of goods stolen, prosecuting the felon to con-

^a Per Lord Mansfield C. J. 1 T. R. 26. ^f *Blaker v. Ancombe*, 1 Bos. & Pul.

^b Per Lawrence J. 7 T. R. 398. N. E. 25.

^c *Ibid.*

^g Cited by Lawrence J. in *Gordon v. Harper*, 7 T. R. 13.

^d *Pyne v. Der*, 1 T. R. 25.

^e *Williams v. Williams*, 12 East, 209.

viction, cannot recover the value of them in trover from a person^b who has purchased the goods in market overt, and sold them again before the conviction, notwithstanding the owner gave the purchaser notice of the robbery, while the goods were in his possession; for, in order to maintain trover, the plaintiff must prove that the goods were his property, and that *while they were so*, they came into the possession of the defendant, who converted them to his own use.

If a tradesman order goods to be sent by a carrier^l, though he does not name any particular carrier, the moment the goods are delivered to the carrier, such delivery operates as a delivery to the purchaser, and the whole property is immediately vested in him; and if any accident should happen to the goods, it will be at the risk of the purchaser (1).

So if A. order goods to be transmitted to him by a particular carrier^k, though upon condition to return them again, if he dislike them; yet upon delivery to the carrier the property is vested in A. and he will be bound to pay the price to the vendor, and consequently the vendor cannot bring trover against the carrier, if the carrier *convert* the goods to his own use (2).

If A. order a tradesman to send him goods by a hoyman^l, and the tradesman send the goods, by a porter, to the house, where the hoyman resides, when in town, and the porter, not finding him, leave the goods with the landlord, A. cannot maintain trover against the landlord, for the property never vested in A., but remained in the tradesman; but if the person to whom the goods were delivered had been a servant to the hoyman, and entrusted by him to receive the goods, A. might have maintained trover^m; for, by such delivery, the property would have vested in him, and therefore in

^b Horwood v. Smith, 2 T. R. 750.

ⁱ Said to have been determined by Eyre C. J. at Shrewsbury Assizes, 3 P. Wms. 196. Dutton v. Solomonson, 3 Bôa. & Pul. 582. S. P.

^k Haynes v. Wood, per Herbert J. Surrey Ass. 1686. Bull. N. P. 36.

^l Colston v. Woolston, T. 1 Ann. London Sittings, per Holt, C. J. Salk. MSS. Bull. N. P. 35, 6.

^m See Staples v. Alden, 2 Mod. 309: per Holt C. J. Salk. 19, 8. P.

(1) The only exception to the purchaser's right over the goods is, that the vendor, in case of the purchaser becoming insolvent, may stop them *in transitu*.

(2) N. Trover will not lie against a carrier for the *mere non-delivery* of goods. See ante, p. 377.

such case the tradesman could not have brought trover against the hoyman.

The property of goods passes by the endorsement and delivery of the bill of lading, by the consignee, to another, *bonâ fide*, for a valuable consideration, and without collusion with the consignee^a, although the endorsee knew at the time that the consignor had not received payment in money for his goods, but had taken the consignee's acceptances payable at a future day, not then arrived.

If goods are sold, to be paid for within a limited time^b, and if not removed at the end of that time, that warehouse rent shall be paid for them, the property in the goods vests absolutely in the purchaser, from the moment of the sale.

If a person contracts with another for the purchase of a chattel, e. g. a barge, which is not in existence at the time of the contract, although the full value of the article contracted for is paid in advance, and the order is proceeded on, yet the purchaser does not acquire any property in the article, until it is finished and delivered to him^c.

After earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and, therefore, if the vendee do not come and pay for, and take away the goods, the vendor ought to go and request him; and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person^d. "If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the *property* of the horse is *by the bargain* in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. *And if the horse die in my stable, between the bargain and the delivery*, I may have an action of debt for my money, *because, by the bargain, the property was in the buyer*."

The action of trover cannot be supported, unless there is a perfect and complete right of property in the plaintiff.

Hence when goods are sold, if any thing remain to be done on the part of the seller, *as between him and the buyer*^e,

^a Cuming v. Brown, 9 East, 506.

^b Phillimore v. Barry, 1 Camp. N. P. C. 513.

^c Mucklow v. Mangles, 1 Taunt. 319.

^d Per Holt C. J. in Langford v. Administratrix of Tyler, Salk. 113.

^e Noy's Maxims, 88. recognised by Ld. Ellenborough C. J. in Hinde v. Whitehouse, 7 East, 571.

^f See Whitehouse v. Frost, 19 East, 614.

before the commodity purchased is to be delivered, a complete present right of property does not attach in the buyer, and consequently trover is not maintainable.

The plaintiff purchased of the defendant a quantity of starch, which was lying at the warehouse of a third person, at so much per cwt. by bill at two months, for the delivery of which, fourteen days were to be allowed; the weight not having been ascertained at the time of purchase, the defendant gave, according to the usual mode, a note to the warehouse-keeper to *weigh and deliver* all his (the defendant's) starch. By virtue of this order, a partial weighing and delivery of several quantities of the starch took place. Trover having been brought for the remainder, which was unweighed and not delivered, it was holden, that the action could not be supported, although it was contended on the part of the plaintiff, that a delivery of part of an entire quantity of goods contracted for was a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole, although the price for the same should not have been paid. *Per cur.* Without deciding what might be the legal effect of such part delivery, in a case where the payment of price was the only act necessary to be performed, in order to vest the property; in this case, another act was necessary to precede both payment of price and delivery of the goods bargained for, viz. weighing. Until the starch was weighed, the warehouse-keeper, as agent of the defendant, was not authorised to deliver it; still less was the buyer authorised to take it by his own act from the warehouse; and if he could not so take it, neither can he maintain an action of trover founded on such a supposed right to take, or in other words, founded on such a supposed right of property in the subject matter of this action.

But where every thing has been done by the sellers which they contracted to do, the property will in many cases pass to the buyers, although the goods still continue in the possession of the sellers. As where turpentine in casks was sold by auction at so much per cwt., and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers, on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers, at the time of the sale, and the remainder within 30 days on the goods being

Hanson v. Meyer, 5 East, 614. See also *Regg v. Hunt*, 14 East, 400
also *Zagury v. Furnell*, 2 Camp. 500. J.T.

delivered; and the buyers had the option of keeping the goods in the warehouse, at the charge of the seller, for those 30 days, after which they were to pay the rent; and the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out, in order to enable the custom-house officer to gauge them; but before he could fill up the rest, a fire consumed the whole in the warehouse within the 30 days. It was holden, that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller; for it was the business of the buyers to get them gauged, without which they could not have been removed; and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was. But the property in the casks not filled up remained in the seller, at whose risk they continued.

Special Property. — A special property is, where he who has the possession of goods, holds them subject to the claims of other persons² (3). This is sufficient to enable him to maintain trover against a stranger. Hence this action may be brought

By a bailee².

By a carrier².

By leasee for life against a stranger, who takes away the timber of a house which has been blown down; for the lessee for life has a special property to make use of the timber (as if he would rebuild), though the general property be in the reversioner².

² Per Lawrence J. in *Webb v. Fox*, 7 T. R. 398. ² *Goodwin v. Richardson*, 1 Rol. Abr. 4. (1.) pl. 1.
² Per Lord Mansfield, 98. *Arnold v. Jeffre*. ² Per Powell J. *Midland Circuit*, Salk. MSS. Bull. N. P. 33.
² Per Lord Raym. 976.

OF THE IMMEDIATE RIGHT TO REAL PROPERTY MUST BE VESTED IN ONE PERSON ONLY [for in several persons in the same right]; whereas a special property, in the case of personality, may be in one, as in the case of carriers, while the absolute right to it may exist in another. When a competition arises between those two persons, the right of the latter must prevail; but as against all other persons a special property is sufficient." Per Lord Kenyon C. J. 7 T. R. 396.

By a lord who seizes an estray or wreck, against a stranger, before the year and day are expired^b.

By a sheriff against a person who takes away goods (which have been seized by the sheriff in execution) before they are sold^c. But a landlord who has distrained goods, cannot maintain trover for them^d; for he had at common law a power to detain the goods as a pledge only, and although by statute he is authorised to sell, yet he has not any property.

In addition to these instances of special property, it is to be observed, that there may be special property without possession, or there may be special property arising simply out of a lawful possession, and which ceases when the true owner appears; as where a chimney-sweeper's boy having found a jewel^e, carried it to a goldsmith, to be informed what it was, who refused to return it; it was holden, that though the boy, who was the plaintiff, did not by such finding acquire an absolute property in the jewel, yet he had such a property as would enable him to keep it against all persons except the rightful owner, and consequently that he might maintain trover for it against the goldsmith, who was a wrong-doer. So a possession under the rightful owner is sufficient against a person having no colour of right. As where the plaintiff bought and paid for a ship stranded on the coast, but did not comply with the regulations of the register acts; he endeavoured for several days to get the ship off, but without success: at length she went to pieces. The defendant having possessed himself of parts of the wreck which had drifted on his farm, it was holden^f, that the plaintiff had sufficient property in him to enable him to maintain trover against a wrong-doer, for as far as regarded the possession of the plaintiff, it was good as against all except the vendor; and although the plaintiff had no absolute property as against the vendor, yet he claimed under him, and had the possession against those who tortiously took the goods without colour of right. There is one case in which a temporary property^g merely has been holden sufficient to maintain trover:—as where defendant having agreed to sell the plaintiff an estate, with the usual proviso, that in case the vendor could not make a title, the contract

^b Sir W. Courtney's case, C. B. Salk.

MSS. Pye v. Pleydell, Berks, 1750.

per Clarke, Bar. S.P. Bull. N.P. 33.

^c Wilbraham v. Snow, 2 Saund. 47.

^d Moneux v. Goreham, per Probyn,

C. B. at Huntingdon, 29 M. S. Serj. Hill, p. 279.

^e Armory v. Delamirie, 1 Str. 505. Mildx. Sitt. coram Pratt C.J.

^f Sutton v. Buck, 2 Taunt. 302.

^g Roberts v. Wyatt, 2 Taunt. 362.

should be void, delivered to the plaintiff an abstract of the title. The plaintiff laid this abstract before counsel, and having received it back with an opinion written at the foot, and several queries in the margin, he left it with the defendant, requesting him to copy the opinion, and marginal observations, and return the abstract as soon as he had copied them. After the plaintiff had several times in vain applied to have the abstract returned, at length he made a formal demand of it, when the defendant refused to redeliver it, observing that as he had been unable to clear up the objections of the plaintiff's counsel, the abstract would be useless to the plaintiff. The plaintiff having brought an action of trover for the abstract, it was holden, that he was entitled to recover; Chambre J. observing, that as to the general property in the abstract, while the contract is open, it is neither in the vendor nor in the vendee absolutely, but if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the mean time the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to shew on what ground he did reject the title.

2. *Right of Possession.*—The plaintiff must not only have a right of property but a right of possession also, and unless both these rights concur, the action will not lie. Hence where a person leased a house with the furniture therein^h, to another, for a certain time, and during the term the furniture was taken in execution by the sheriff, at the suit of J. S., against a person to whom the furniture formerly belonged; it was holden, that the landlord could not maintain trover against the sheriff for the value of the furniture, because the plaintiff had not the right of possession during the demise; the tenant's property and interest did not determine by the sheriff's trespass; the tenant might have maintained trespass against the wrong-doer, and recovered damages.

But the right of possession is sufficient, without having had actual possession (4). Henceⁱ where in trover the plain-

^h Gordon v. Harper, 7 T. R. 9.

ⁱ Hudson v. Hudson, Latch. 214.
cited by Lawrence J. 7 T. R. 13.

(4) Hence on the trial of an ejectment for a mine, it was holden, that a recovery in trover for a parcel of lead dug out of the mine was not evidence of the plaintiff's possession. *Ld. Cullen's case at bar*, B. R. Bull. N. P. 33.

tiff, as executor, declared upon the possession of his testator, it was holden to be sufficient; because the personal property of the testator was vested in the executor; and no other person having a right to the possession, the property drew after it the possession in law.

So if A. be indebted to C., and B. indebted to A., and it is agreed between them, that B. shall deliver goods to C. in satisfaction of the debt due from A. to C., and B. afterwards converts the goods to his own use, C. may maintain trover against B., though C. never had possession; for by the agreement the right was in C., and the conversion a wrong done to him.

3. *Personal Goods*.—The subject matter of this action is confined to *personal* goods. Hence trover will not lie for things fixed to the freehold.

Questions respecting the right to what are ordinarily called *fixtures*, principally arise between three classes of persons: 1st. Between different descriptions of representatives of the same owner of the inheritance, viz. between the heir and executor. In this first case, i. e. as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel any thing which has been affixed to the freehold or inheritance. 2dly. Between the executor of tenant for life, or in tail, and the remainder-man or reversioner; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor (5). The

Flewelin v. Rave, 1 Buls. 68. cited 1 Per Ld. Ellenborough C.J. delivering the judgment of the court in *Elwes v. Maw*, 3 East, 51.
in Bull. N. P. 35.

(5) "In deciding whether a particular fixed instrument, machine, or even building, should be considered as removable by the executor, as between the executor and the heir, or between the executor and the person in remainder, the court, in the three principal cases on this subject, (viz. *Lawton v. Lawton*, 3 Atk. 13. which was the case of a fire-engine to work a colliery, erected by tenant for life; *Lord Dudley and Lord Ward, Ambler*, 113. which was also the case of a fire-engine to work a colliery, erected by tenant for life; (these two cases before Ld. Hardwicke;) and *Lawton; executor, v. Salmon*, E. 22 G. 3. 1 H. Blac. 259. in notis, before Ld. Mansfield, which was the case of salt-pans, and which came on in the shape of an action of trover, brought by the executor, against the tenant of the heir at law),

3d case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim

the court may be considered as having decided mainly on this ground, that *where the fixed instrument, engine, or utensil, (and the building covering the same, falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personally.* The *fire-engine*, in the cases in 3 Atk. and Ambler, was an accessory to the carrying on the trade of getting and vending coals, a matter of a personal nature. Lord Hardwicke says, in the case in Ambler, "A colliery is not only an enjoyment of the estate, but in part carrying on a trade." And in the case in 3 Atk. he says, "One reason that weighs with me is, its being a mixed case, between enjoying the profits of the land, and carrying on a species of trade; and considering it in this light, it comes very near the instances in brewhouses, &c. of furnaces and coppers." Upon the same principle, Lord Ch. B. Comyns may be considered as having decided* that a cyder-mill should go to the executor and not to the heir, i. e. as a mixed case between enjoying the profits of the land, and carrying on a species of trade, and as considering the cyder-mill as properly an accessory to the trade of making cyder. In the case of the salt-pans, Ld. Mansfield does not seem to have considered them as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance. He says, "*The salt-spring is a valuable inheritance, but no profit arises from it, unless there be a salt-work, which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance.*" Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade." Per Ld. Ellenborough C. J. delivering the opinion of the court in *Elwes v. Maw*, 3 East, 53, 54.

In trover, by the executor against the heir, Lee C. J. held, that hangings, tapestry, and iron backs to chimneys, belonged to the executor, who recovered accordingly against the heir. *Harvey v. Harvey*, Str. 1141. Middx. Sittings, M. T. 14. G. 2.

Standing corn belongs to a devisee of land, and not to the executor; but a legatee of goods and stock on the farm† shall take it from both. It is agreed, however, that, as between the executor and the heir, if there be not any devise of the land, the executor is entitled to standing corn‡.

* In a case cited in *Lawton v. Lawton*, 3 Atk. 13. 16.

† *Spencer's case*, Winch. 51. Harg. Co. Litt. 55. b. n. (9).

‡ *Cox v. Godsalve*, 6 East, 604. n. *West v. Moore*, 5 East, 339.

§ See the authorities cited in Harg. Co. Litt. 55. b. n. (9).

to having any particular articles considered as personal chattels, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant.

It is a general rule, that where a lessee having annexed any personal chattel to the freehold during his term, afterwards takes it away, it is waste. Some exceptions have been engrafted on this rule, 1. in favour of utensils set up in relation to trade^m, 2. of matters of ornament, as ornamental marble, chimney-pieces, pier glasses, hangingsⁿ, wainscot fixed only by screws, and the like (6).

These the tenant may remove during the term. So a barn erected by the tenant upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, may be removed^o. But a tenant for mere agricultural purposes cannot remove buildings fixed to the freehold, which have been constructed by such tenant for the ordinary purposes of husbandry, and are not connected with any description of trade^p.

4. *Conversion*.—It must appear, that the defendant has been guilty of a wrongful conversion.

The wrongful conversion by the defendant is considered as the gist of the action.

If A. take the horse of B.^q, and ride him, and after deliver him to B., yet B. may maintain trover against A., for the riding was a conversion, and the re-delivery will not bar the action, although it will go in mitigation of damages.

^m *Penton v. Robart*, 2 East, 88.

ⁿ *Beck v. Rebow*, 1 P. Wms. 94.

^o *Culling v. Tufnel*, per Treby C. J. at Hereford, 1694, Bull. N. P. 34.

^p *Elwes v. Maw*, 3 East, 38.

^q *Countess of Rutland's case*, T. 38 Eliz. B. E. 1 Rol. Abr. 5. (L) pl. 1.

(6) "During the term the tenant may take away chimney-pieces, and even wainscot, which is a very strong case; but not after the term; if he did, he would be a trespasser." Per Lord Hardwicke C. 1 Atk. 477. See also Amb. 113. But tenant remaining in possession, after the expiration of the term, may remove fixtures, annexed to the freehold, for the purpose of carrying on trade. *Penton v. Robart*, 2 East, 88. "What would have been held to be waste in the time of Henry the 7thth, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done." Per Lord Hardwicke C. in *Lawton v. Lawton*, 3 Atk. 15.

* See also *Herlakenden's case*, 31 Eliz. 4 Rep. 64.

Drawing out part of the liquor in a vessel, and filling it up with water, is a conversion of all the liquor^r.

If A. find the goods of B., and, upon a demand of the goods, answer that he knows not whether B. is the true owner, and therefore refuses to deliver them; this is not evidence of a conversion, if A. keep them for the true owner^s.

A person is guilty of a conversion who takes the property of one person by assignment from another, who has not any authority to dispose of it (7).

A.^t, a tobacco broker, purchased in his own name, for the plaintiff, some tobacco, which was then in the king's warehouse, and afterwards pledged the same in his own name with the defendant for a sum of money, and transferred it into the defendant's name in the king's warehouse. The defendant was informed of the plaintiff's right to the tobacco, and was applied to, both by the plaintiff and the broker, to deliver the same to the plaintiff, but the defendant refused to make the transfer, or to give an order for the delivery. It was holden, that the acts of the defendant amounted to a conversion.

In a case where the defendant had taken the plaintiff's boat for the purpose of assisting the plaintiff^s, and from a motive of kindness to the plaintiff, and the boat was sunk in the endeavour, Lord Ellenborough C. J. was of opinion, that the act of the defendant could not be deemed an illegal conversion.

With respect to negotiable instruments, *e. g.* bank notes, possession is *prima facie* evidence of property; and persons holding them cannot without strong evidence of fraud, be compelled by any prior holder, who may have been robbed, to disclose the manner in which they received them^x (8).

^r Richardson v. Atkinson, Middx. t M'Combie v. Davies, 6 East, 538.

Sitt. coram Eyre & Fortescue, (ab- u Drake v. Shorter, 4 Esp. N. P. C.

sente C. J.) 1 Str. 576.

165.

a Per Coke, C. J. 2 Bulst. 312.

x King v. Milsom, 2 Camp. N. P. C. 5.

(7) "Assuming to oneself the property and right of disposing of another man's goods, is a conversion." Per Holt C. J. in Baldwin v. Cole, 6 Mod. 221. recognised by Ld. Ellenborough C. J. in 6 East, 540.

(8) "For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder, with the bills, takes the property, and his title is stamped upon the

Although it appears formerly to have been doubted whether in the case of a tortious taking, the plaintiff was not confined to an action of trespass, yet it is now agreed, that in such case the plaintiff has his election to bring either trespass or trover; for a tort may be qualified, though it cannot be increased⁷.

If A. lodges jewels, sealed up, at a banker's, for safe custody only^a; and the banker breaks open the box, and pawns the jewels to another, A. may maintain trover against the pawnee for the conversion of the jewels to his own use.

In an action of trover for plate^a, it appeared that the plaintiff claimed under a remainder-man, against the defendant, to whom it was pawned by the tenant for life. That I. S., by will, gave his plate to trustees for the use of his wife *durante viduitate*, requiring her to sign an inventory, which she did at the time the plate was delivered into her possession. She afterwards pawned it with the defendant for a valuable consideration, who had no notice of the settlement, and before the commencement of this action she died. A demand and refusal was proved. After verdict for plaintiff, the court were of opinion, on a case reserved, that the defendant was bound to deliver up the plate, without being paid the money he had advanced on it, observing, that the point was clearly established, and the law must remain as it is, until the legislature thought fit to provide, that the possession of such chattels shall be a proof of ownership.

By stat. 1 Jac. 1. c. 21. the sale of any goods wrongfully taken, to any pawnbroker in London or within two miles thereof, shall not alter the property.

If goods stolen are pawned, the owner may maintain trover against the pawnbroker^b. N. In this case the goods had been stolen from the plaintiff's house, and pawned with

^a Bishop v. Montagu, Cro. Eliz. 824.
Cro. Jac. 50. S. C.

² Hartop v. Hoare, E. 16 G. 2. K. B.
Str. 1187. more fully reported in
3 Atk. 44. and 1 Wils. 8.

^a Hoare v. Parker, 2 T. R., 376.
^b Packer v. Gillies, London Sitt. after Trin. T. 1806. Ld. Ellenborough
C. J. 2 Camp. N. P. G. 208. a.

themselves. "The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods of which the property and possession may be in different persons." Per Eyn. C. J. delivering the opinion of the court in Collins v. Martin, 1 Robt. & Pul. 651.

defendant by a person who had been tried for the felony, and acquitted on the absence of a material witness.

A wharf, even in London, is not a market overt^c for the articles bought there.

If, upon an information of seizure, the goods be condemned, no action will lie for them. But if there be no condemnation, and the goods were not liable to be seized, trespass or trover will lie against the officer for them^d. But by stat. 19 G. 2. c. 34. s. 16. if the judge certify on the record, that there was a probable cause for such seizure, then the plaintiff, beside his ship or goods so seized, or the value thereof, shall not be entitled to above two-pence damages, nor to any costs of suit.

If goods be obtained from A. by fraud^e, and pawned to B., without notice, and A. prosecute the offender to conviction, and get possession of his goods, B. may maintain trover for them; for this is distinguishable from the case of felony, where the owner's right of restitution is given by positive statute (21 H. 8. c. 11.).

As the master^f of a ship has no general authority by law, in the absence of his employers, to sell the ship entrusted to his care, but only an implied authority to act for the benefit of the concern, exercising a sound discretion, such as the owner himself would exercise if he were upon the spot, it follows, that the owner of a ship may recover in an action of trover the value of the same from a vendee claiming by purchase from the master, unless the vendee can shew that this ship was sold by the master under such an urgent necessity as would have induced the owner to have sold the ship if he had been present.

So, although the captain of a ship find it impossible to reach his port of destination, he has not any implied authority, as the agent of the shippers, to sell the cargo for their benefit in a foreign port, into which he is driven; and if he does so, although it should appear that he acted *bona fide* for the interest of all persons concerned in the adventure, yet such sale will be considered as a tortious conversion, for which the ship-owner is liable^g.

A. entrusted B. with goods to sell in India^h, agreeing to

^c *Willinson v. King*, 2 Camp. N. P. C. 385.

^d *Tinkler v. Poole*, 3 Wils. 146. 5 Burr. 2637.

^e *Parker v. Patrick*, 5 T. R. 173.

^f *Hayman v. Madhou*, B. R. London Sitt. Nov. 1, 1803. Ellenborough

C. J. Abbott, p. 5. ed. 2d. and 5 Esp. N. P. C. 65. S. C. *Reed v. Darby*, Trin. 48 G. 3 B. R. 10 East, 143.

^g *Van Omeron v. Dowick*, 2 Camp. N. P. C. 42.

^h *Bromley v. Coxwell*, 2 Bos. & Pul. 439.

take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. B., not having been able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to him (B.) in England. It was holden that A. could not maintain trover against B. for the goods.

Trover will not lie for goods irregularly sold under a distress^l; the statute 11 G. 2. c. 19. s. 19. having declared that the party selling should not be deemed a trespasser *ab initio*, and having given an action on the case to the party grieved by such sale.

But if a party pay money in order to redeem his goods from a wrongful distress for rent^k, he may maintain trover against the wrong-doer.

II. *By whom and against whom Trover may be maintained.*

ONE joint-tenant, or tenant in common, or parcener, cannot bring trover against his companion for goods remaining in his possession, because the possession of one is the possession of both; if trover be brought, the joint-tenancy, &c. is good evidence upon the plea of not guilty^l.

Upon this principle it was holden^m, that A., a member of an amicable society, who had been entrusted with a box, containing the sums of money subscribed, and was bound by bond to keep it safely, could not maintain trover against B., another member of the same society, and a stranger, in a case where B. had got possession of the box, carried it away, and delivered it to the stranger; Buller J. observing, that it was admitted, that one of the defendants was a member of this society, and, consequently, had a general property in the box; that a special property could not give a right in this action against a general property. The custody only was committed to the plaintiff; the property remained in the society.

^l Wallace v. King, 1 H. Bl. 13.
^k Shipwick v. Blanchard, 6 T. R. 598.
^l 2 Leys. 220. case 278.

^m Holliday v. Cammell and White, 1 T. R. 658.

After an act of bankruptcy, committed by one of two partners^a, joint effects were sent away, which came to the defendant's hands; then the solvent partner died, leaving the defendant his executor, and afterwards a commission of bankrupt was taken out against the surviving partner, and his estate assigned to the plaintiffs; it was holden, that they were tenants in common with the solvent partner, and after his decease with his representatives, by relation from the act of bankruptcy; and, consequently, could not maintain trover against the defendant claiming under such solvent partner.

After an act of bankruptcy, committed by one of two partners^a, the other delivered goods, part of their joint property, to a creditor, for a joint debt, and died, and afterwards a commission issued against the surviving partner; it was holden, that this was in substance the same with the preceding case; that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods with the assignees of the bankrupt by relation from the act of bankruptcy, which was in the life-time of the solvent partner, and, consequently, that the assignees could not maintain trover against such creditor.

If one tenant in common merely takes the thing in common out of the possession of his companion, and carries it away, there no action lies by the other tenant in common^a; but if he destroy the thing in common, the other may bring trespass or trover. As^a where it appeared that one tenant in common of a ship had forcibly taken it out of the possession of his companion, and secreted it from him, so that he knew not where it was carried, and changed the name of it, and it afterwards got into the hands of a third person, who sent it on a foreign voyage, where it was lost, Lord King C. J. left it to the jury, whether under the circumstances, the destruction was not by the defendant's (the tenant in common) means; and the jury finding in the affirmative, the court on motion for a new trial, approving of the chief justice's direction, refused to set aside the verdict (9).

^a Smith and others, assignees &c. v. Barnardiston v. Chapman, C. B. Hil. Stokes, 1 East, 363. T. 1 G. 1. cited from Ld. C. J.

^o Smith and others, assignees, &c. v. King's MS. in Heath v. Hubbard, Oriell, 1 East, 368. 4 East, 121.

^p Brammel v. Jones, B. R. T. 22 Geo. 3. MS.

(9) It seems that the sale of the whole of a ship by one who is only a part owner, in exclusion of the right of another, who is te

The preceding case proceeded upon the principle that there was a destruction of the subject matter, and it is now established, that one tenant in common cannot recover for a chattel in trover against his companion, without first proving a destruction of the chattel, or something that is equivalent to it. Hence, where one of two tenants in common of a whale cut it up and expressed the oil, it was holden, that such alteration in the form of the property did not amount to a tortious conversion, so as to enable the companion to maintain trover; for the act done was an application of the whale to the only purpose which could make it profitable to the owners, and tended to preserve it instead of destroying it, which one tenant in common was clearly entitled to do; and as the parties were clearly tenants in common of the whale, they became tenants in common of the produce, after it was converted into oil. N. It was admitted in this case, that the taking by the defendant, and the refusal to deliver on demand made, was not any misfeasance in a tenant in common, and did not give a right of action. It will be proper, however, to remark, that the rule that one tenant in common cannot bring trover against his companion, holds only in those cases where the law considers the possession of one to be the possession of both. Hence, where A. is tenant in fee of one fourth part of an estate, and B., tenant in common with him, of the other three parts for a term of years, without impeachment of waste, if A. cut down any trees, and B. take them away, A. may maintain trover; for though B., being dispunishable of waste, might cut down what trees he would, yet trees having an inheritable quality, and B. not having any interest in the inheritance, he cannot take the trees when felled by him who has the inheritance, and, consequently, his possession being tortious cannot be said to be the possession of the other.

It is to be observed also, that if one joint-tenant, &c. bring trover, without his companion, against a stranger, the defendant cannot give the joint-tenancy, &c. in evidence on the general issue, so as to bar the plaintiff of his action, but only to prevent him from recovering any more than his own share in the value of the property in question; for

r *Fennings v. Ld. Grenville*, 1 Taunt. 241.

s *West v. Pasmore*, at Exeter, per
Tarton J. Salk. MSS. Bull. N. P. 35.

t *Neithorpe v. Farrington*, 2 Lev. 118. Adm. in *Barnardiston v. Chapman*, C. B., 11 T. 1 G. 1. cited in 4 East, 121.

nant in common with him, is not equivalent to the destruction of the subject matter, mediately or immediately, so as to enable his co-tenant to maintain trover against him for it. 4 East, 116. See also *Graves v. Sawyer*, T. Raym. 15.

it is a general rule, that the defendant can avail himself of an objection of this sort, viz. that all the part-owners of a chattel have not joined in an action of trespass or tort, brought in respect of such chattel, by a plea in abatement only; and if one of two part-owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, the other part-owner may afterwards sue alone, and the defendant cannot plead in abatement of such action².

Trover will lie against a corporation³.

III. The Declaration—Plea—Defence, and herein of the Doctrine of Liens—Evidence—Of staying the Proceedings—Costs—Judgment.

Venue.—THIS is a transitory action, and the venue may be laid in any county⁴.

The declaration states, that the plaintiff was lawfully possessed of the goods in question (10), as of his proper goods and chattels (11), and that being so possessed, he casually lost them, and that they came to the hands and possession

² *Blount v. Hubbard*, 5 East, 430.
³ *Sodgworth v. Overend*, 7 T. R. 979.

⁴ *Yarborough v. The Bank of England*, B. R. Trin. T. 52 G. 3.
⁵ *Brown v. Hedges*, Salk. 290.

(10) The goods in question should be described with such convenient certainty, that the jury may know what is meant, but in this action the same accuracy and precision are not required as in the action of detinue, which is for the recovery of the things themselves in specie, if to be had. Hence, a declaration in trover for twenty ounces of cloves and mace⁶, ten pair of curtains and valances, some parcel of diamonds⁷, for the furniture, apparel, &c. belonging to such a ship⁸, has been holden good.

(11) The omission of the words, "as of his proper goods," is cured by verdict, *Jones v. Winckworth*, Hardr. 111.; but fatal after a judgment by default. *Swallow v. Ayncliff*, B. R. M. 2 G. 2. MSS.

⁶ *Hartford v. Jones*, Salk. 654.

⁷ *Taylor v. Wells*, 2 Saund. 74.

⁸ *White v. Graham*, Str. 327. Ld. Raym. 1530.

⁹ *Nightingale v. Bridges*, Carth. 131.

of the defendant, by finding (12), who afterwards (15) converted (14) them to his own use.

This is the substance of the declaration in common cases. Where the action is brought by an executor, administrator, or the assignees of a bankrupt; the character in which the party sues must of course appear on the face of the declaration.

Care must be taken to state the possession to be in the person to whom the property belongs.

In an action of trover by the assignee of bankrupt partners*, the declaration consisted of one count only, in which the possession was stated to be in the partners. It appeared in evidence, that the greater part of the goods in question belonged to one of the partners only, before the commencement of the partnership; and had never been brought into the partnership fund. It was proved, that the residue of the goods was part of the joint estate. Per Kenyon C. J. the plaintiff under this declaration is entitled to recover the value of such goods only as have been proved to belong to both the partners as partners. Had there been a count in the declaration, stating the possession in the assignee, as

a Cock, assignee of Kent and Pemberton, v. Tunno, London Sittings after H. T. 41 G. 3. B. R. Kenyon C. J. MSS.

(12) The conversion is the gist of the action, and the manner in which the goods came to the hands of the defendant is only inducement*; and, therefore, the plaintiff may declare that the goods came to the possession of the defendant generally or specially, by finding, (though the defendant came to the goods by delivery†,) or that the defendant fraudulently, at cards, won money of the plaintiff from the wife of the plaintiff‡.

(13) In the declaration the conversion was laid, under a scilicet, to be on a day before the trover§. Upon motion in arrest of judgment, the declaration was holden to be good, for the *postea conversionis* is sufficient, and the scilicet is void.

(14) Though it be necessary to allege a day and place of conversion||, (or of a request and refusal, which is tantamount¶,) yet as it is a transitory action, the conversion may be laid here, and proved in Ireland**.

* Isaack v. Clark, 2 Bulst. 306.

† 2 Bulst. 313. per Coke C. J.

‡ Vid. Ent. 265.

§ Teasmond v. Johnson, Cro. Jac. 428.

|| Hubbard's case, Cro. Eliz. 78.

¶ Wilson v. Chambers, Cro. Car. 262.

** Brown v. Hedges, Falk. 290.

this was a joint commission, and the assignment under such commission passes both separate and joint effects^b, the whole might have been recovered; as it is, the verdict must be for that part only which has been proved to be the property of the partners. The jury found a verdict accordingly.

In trover by husband and wife, the declaration ought not to allege the possession in them both^c, nor state the damage to have accrued to them both^d; for the law will transfer, in point of ownership, the whole interest to the husband.

If trover be brought *against* baron and feme, and it is alleged in the declaration that they converted the goods to their own use, the judgment may be arrested^e or reversed^f on writ of error (15).

It seems^g, however, as the conversion is a tort, that the wife may be charged with it in the same manner as with a trespass; that is, the declaration may state, that the husband and wife converted the goods, omitting the words, to their own use.

Plea.

The general issue in this action is not guilty; under which plea every ground of defence which proves that the conversion was lawful may be given in evidence; for the gist of the action of trover is a *wrongful* conversion.

Hence, in trover for a gun^h, the defendant may give in evidence, that he was a gamekeeper of the manor of B., and took the gun by virtue of the stat. 29 & 29 Car. 2., though the act do not authorize the pleading the general issue, and, therefore, it would be otherwise in trespass for

^b Exp. Cook, 2 P. Wms. 500.

^c Per Yelverton J. Yelv. 165.

^d Saik. 114.

^e Rhemes v. Humphreys, Cro. Car. 254.

^f Berry v. Nevyn, Cro. Jac. 661. Perry v. Diggs, Cro. Car. 494. S. P.

^g Draper v. Fulkcs, Yelv. 165. Anon. 1 Vent. 24.

^h Danev. Walter, in Kent, 1692. Bull. N. P. 49.

(15) But where in *trespass*^{*} against baron and feme for entering an house, and taking goods, the declaration stated, that they converted the goods to their own use: on motion in arrest of judgment, the declaration was holden good; for the conversion in this case is not the gist of the action, and the action being maintainable for entering the house and taking the goods, the court will intend that the damages were given for those trespasses only.

^{*} Smalley v. Kerfoot, Str. 1694. Andr. 242. S. C. Pullen v. Palmer, Bull. N. P. 46. S. P.

taking it. So the defendant may give in evidence on the general issue, that he took the goods in question for toll¹.

Where an administrator brings trover upon his own possession², the defendant may give in evidence a will, and an executor, upon not guilty; otherwise, if it be on the possession of the intestate, (as in the principal case) for there the defendant ought to plead it in abatement, and if he does not, he shall not give it in evidence.

The defendant may also plead the statute of limitations³, viz. that the cause of action did not accrue at any time within six years next before the commencement of the plaintiff's action.

Where an executor, several years before, had left some household stuff in the house, by the consent of the heir⁴, who used them afterwards, and within six years of the action brought, the executor demanded the goods, and the heir refused to deliver them, whereupon trover was brought, and the statute of limitations pleaded; it was holden, that the user *before* the demand was neither a conversion, nor any evidence of it; for it was with the consent of the executor until that time; and the demand being within six years, the refusal, which ensued it, and which was the only evidence of a conversion in the case, was within the six years; and if a trover be before the six years, and a conversion after, the statute cannot be pleaded.

Bankruptcy of the defendant after the cause of action accrued, cannot be pleaded, because the damages in trover are uncertain⁵.

Defence, and herein of the Doctrine of Liens.

The most usual defence to this action is, that the defendant has a lien on the goods, or a right to detain them. It will be proper, therefore, to inquire under what circumstances a party may insist on this defence.

There are two species of liens known to the law, namely, *particular liens* and *general liens*⁶. *Particular liens* are, where persons claim a right to retain goods, in respect of labour or money expended on such goods, and these liens

¹ Sir W. Jones, 940.

² *Blainfield v. March*, per Holt C. J. London Sittings, Salk. 285.

³ 2 Jac. 1. c. 16.

⁴ *Wortley Montague v. Lord Sandwich*, 7 Mod. 99. cited by Lawrence

J. in *Topham v. Braddish*, 1 Taunt. 577.

⁵ *Parker v. Norton*, 6 T. R. 695.

⁶ Per Heath J. 3 Bos. & Pul. 494. and per Kenyon C. J. 1 Esp. N. P. C. 109. per Lord Mansfield C. J. 4 Burr. 921.

are favoured in law. *General liens* are claimed in respect of a general balance of account; and these are founded on express agreement, or are raised by implication of law, from the usage of trade, or from the course of dealing between the parties, whence it may be inferred, that the contract in question was made with reference to their usual course of dealing.

By the common law, where a party is obliged to receive goods, he is also entitled to retain them for his indemnity (16). Upon this principle, it has been holden, that common carriers^p (17) and innkeepers have a particular lien on the goods intrusted to their care. In like manner, millers have a particular lien on the produce of corn, which they have ground, for the price of grinding^q.

A person^r, who by his own labour preserves goods, which the owner, or those intrusted with the care of them, have either abandoned in distress *at sea*, or are unable to protect and secure, is entitled by the common law of England to retain the possession of the goods saved, until a proper compensation is made to him for his trouble (18). The reason

p *Skinner v. Upshaw*, *Ld. Raym.* 753. q *Per Holt C. J. in Hartford v. Jones*, *Lord Raym.* 393. *Salk.* 654. *Abbott*, 356. ed. 2nd.

(16). It was said by *Ryder C. J.* delivering the opinion of the court in *Brenan v. Currant*, *T.* 28 and 29 *G. 2. B. R. MSS.* that he had not found it laid down as a general rule, that the remedy by retainer was co-extensive with the obligation to receive goods. But see *Ld. Raym.* 867.

(17) See further as to the lien of carriers, *ante*, tit. Carriers, *Sett. III.* and *Rushforth v. Hadfield*, 7 *East*, 224.

(18) By stat. 26 *G. 2. c. 19. s. 5.* it is enacted, "that in case any persons not employed by the master, mariners, or owners, or other persons lawfully authorised, in the salvage of any ship, or the cargo or provision thereof, shall, in the absence of persons so employed or authorised, save any such ship or goods, and cause the same to be carried, for the benefit of the proprietors, into port, or to any adjoining custom-house or place of safe custody, immediately giving notice thereof to some justice, magistrate, custom-house or excise officer, or shall discover to any such magistrate or officer, where any such effects are wrongfully bought, sold, or concealed, such persons shall be entitled to a reasonable reward to be paid by the master or owner of the vessel or goods, and to be adjusted in case of disagreement about the *quantum*, in the same manner as salvage is to be adjusted or paid by stat. 12 *Ann. c. 2. c. 18.* or by stat. 26 *G. 2. c. 19.*"

of this rule is obvious: goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempest, and accidents*, (far beyond the reach of human foresight to prevent,) are hourly creating, and against which it too often happens, that the greatest diligence, and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompence for the encouragement of those who engage in so dangerous a service.

As to *general liens*, it has been determined, that the attorneys and solicitors of the different courts have a lien on all papers remaining in their hands, and judgments recovered, for their costs* (19).

So where a banker has advanced money to a customer*, he has a lien upon all the securities which come into his hands belonging to that person, for the amount of his general balance: unless there be evidence to shew, that he received any particular security, under special circumstances, which would take it out of the general rule.

So a calico-printer has a lien upon the linen in his possession*, for the general balance of his account, for work done in the course of that business.

In like manner it has been determined, that dyers*, factors*, (20), and wharfingers*, have liens for their general balance.

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| <p>• Nicholson v. Chapman, 2 H. Bl. 254.
 † Mitchell v. Oldfield, 4 T. R. 123.
 u Davis v. Bowsher, 5 T. R. 488.
 x Exp. Andrews, 21 June, 1764. per
 Lord Northington C. Co. B. L. 499.
 edit. 5th. Weldon v. Gould, 3 Esp.
 N. P. C. 268. Kenyon C. J.</p> | <p>y Savile v. Barchard, 4 Esp. N. P. C.
 53. Kenyon C. J.
 z Kruger v. Wilcox, Ambler, 252.
 Gardener v. Coleman, cited 1 Barr.
 494. and 6 East, 28. per Buller J.
 S. P.
 a Naylor v. Mangles, 1 Esp. N. P. C.
 109.</p> |
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(19) But in one case, where A. purchased the interest of a lease for years, and the writings were left in the hands of B. an attorney, to draw an assignment of the lease; B. drew the assignment, and it was sealed, but B. refused to deliver it, until A. paid for the drawing, &c.; upon which A. brought trover against B. for the deed: Holt C. J. held, that the action would lie; because B. might have an action for what he deserved, but that he could not detain for it. Anon. Pasch. 6 W. & M. at Nisi Prius. Ex rel. Mr. Place, 1 Ld. Raym. 738.

(20) See further as to the lien of factors, ante, tit. Factor, p. 737.

The master of a vessel has a lien on the trunk of a person whom he has conveyed in his vessel, until a reasonable sum has been tendered for the passage^b. N. It did not appear in this case, what were the terms of the contract; but it was proved, that the defendant had brought the plaintiff and his trunk, containing his wearing apparel, home in his vessel from the Brazils to London; 15*l.* had been paid by the plaintiff, but the defendant claimed 15*l.* more, and insisted on detaining the trunk until the rest was paid. It was proved, that 30*l.* was a reasonable sum for the conveyance of the plaintiff.

But the master of a ship has not a lien on the ship^c, for money expended or debts incurred by him for repairs done to it on the voyage. Policy brokers have a lien for their general balance^d; but not where they have notice, that the person who employs them acts merely as an agent^e; and it has been holden, that where an English subject, in time of war, informed the broker, that the property insured was neutral, that was a sufficient indication to the broker, that the party acted as agent^f.

A general right of detaining a thing until the money due for the work done upon it be paid, may be waved by a special agreement.

Hence, where A.^g agreed to pay a farrier half a guinea for curing his horse of a distemper, and also a *reasonable sum* for keeping it until it was cured; and after it was cured, A. tendered the farrier the sum agreed on for the cure, who refused to deliver the horse unless A. would pay him 1*l.* 17*s.* 6*d.* for the keeping of the horse; in trover for the horse, it was holden, that although in general a *farrier might* have a right to detain a beast delivered to him to be cured, until the money due for curing it was paid, (upon which point, however, the court declined giving any opinion,) yet it was clear, that in the present case the farrier had no such right; because the general right of detaining (if he had any) was waved by the special agreement that the party should pay a certain sum; and if the farrier could not detain the horse for the cure, *a fortiori* he could not for the keeping of it. The authorities relied on by the court were 2 Rol. Abr. 92. (M.) pl. 1, 2. 6. Str. 651. Yelv. 66. and the following case:

b Woolff v. Summers, London Sittings

after H. T. 51 G. 3. Lawrence J.

c Hussey v. Christie, 9 East, 496.

d Whitehead v. Vaughan, B. R. T. 25 G. 3. Co. B. L. 566. 5th ed.

e Maape v. Henderson, 1 East, 335.

f Snook v. Davidson, 2 Camp. N. P. C. 218.

g Snook v. Davidson, ub. sup.

h Breun v. Curvint, T. 28 & 29 G. 2.

i B. R. Say. R. 224. shortly stated in Bull. N. P. 45. and MSS.

In trover by an assignee of a bankrupt^a, it appeared that the goods had been attached in the hands of J. S. (to whom they had been delivered by the bankrupt (21),) in a plaint at the suit of the defendant. Afterwards, and before condemnation, an act of bankruptcy was committed; then the goods were condemned, and satisfaction entered on the record by the defendant. It was holden, that this evidence was sufficient to charge the defendant, the property not being altered until condemnation; and that the person who delivered the goods by compulsion of law was discharged. The C. J. added, that if goods were delivered to a manufacturer, he might detain them for what he deserved for his labour, but if there was an agreement for the price he could not; in that case he must rely on the contract, and be in the same condition with other creditors.

If a person having a lien upon goods, e. g. for warehouse rent, when they are demanded of him, claims to retain them upon a different ground, viz. that the goods are his own property, and does not make any mention of the lien, trover may be maintained against him, without evidence of a tender having been made to him in respect of his lien^b.

A lord of a manor seized a beast as an estray^c, and kept it for some time after having proclaimed it; the owner afterwards, and within the year, claimed it, and brought trover, without having first tendered a satisfaction for the keeping of it; and for the want of this, it was holden, that the action would not lie.

But if a horse be distrained in order to compel an appearance in a hundred-court^d, after appearance the plaintiff cannot justify detaining the horse, until his keep is paid for.

A party cannot acquire a lien by his own wrongful act^e.

If the defendant is to be considered as a mere wrongdoer^f, it is not necessary for the plaintiff to tender him an

^a Collins v. Ongly, B. R. E. 9 W. 3.
per Holt C. J. cited by Ryder C. J.
in Brennan v. Currint, MSS.
^b Boardman v. Sill, 1 Camp. N. P. C.
410. n. Lord Ellenborough C. J.
^c Taylor v. James, 9 Rol. Abr. 92 (M.)
pl. 3.

^d Lenton v. Cook, H. 9 G. 2. Bull. N.
P. 45.
^e Griffiths v. Hyde, Dorset Sum. Ass.
1809. Lawrence J.
^f Lempiere v. Pasley, 2 T. R. 465.

(21) It is not stated for what purpose the goods had been delivered to J. S., but it seems, from the subsequent part of the case, that J. S. was a manufacturer to whom the goods had been delivered by the bankrupt, in order to have some work done to them, under an agreement to pay a certain sum of money for such work.

indemnification for expenses, which have been incurred by him in order to obtain a wrongful possession (22).

But, before a party can entitle himself by an action of trover or relief from an usurious contract^o, he must tender all the money really advanced.

Evidence, wherein of the Ship Registry Statutes.

In order to maintain this action, the plaintiff must prove,

1. Property and right of possession in himself in the goods in question, at the time when they came to the possession of the defendant.

2. The nature and value of the goods converted.

3. Possession in the defendant, and a conversion by him.

In general this is the only proof requisite^p, for it is not necessary to prove the manner in which the goods came to the hands of the defendant, that being matter of inducement only.

In trover for a debenture^q, the plaintiff must prove the number of the debenture as laid in the declaration, and the exact sum to a farthing, or he will be nonsuited; but he need not set out the number (any more than the date of a bond^r, for which trover is brought); for the plaintiff not being possessed of the debenture, may not know the number, and if he should mistake in the number, he must fail in the action.

In trover for a bond^s, the plaintiff will be permitted to give parol evidence of the contents, although he has not given the defendant notice to produce the instrument itself. So in trover for the certificate of a ship's registry^t, the certificate may be proved to have been granted to the plaintiff by the production of the registry, from which it was

^o Fitzroy v. Gwillim, 1 T. R. 153.

^p Bull. N. P. 33.

^q Per Holt C. J. London Sitt. A. D. 1707. Bull. N. P. 37.

^r Wilson v. Chambers, Cro. Car. 262.

^s How v. Hall, 14 East, 274. and see 1 Campb. 144.

^t Butcher v. Jarrat, 3 Bos. & Pul. 143.

(22) It seems, that the same rule holds, where the defendant has incurred an expense in respect of the plaintiff's goods, without an authority from the plaintiff. *Stone v. Lingwood*, Str. 651. which case, however, was denied to be law by Lord Mansfield C. J. 4 Bunt. 2218. Where possession has been obtained by a misrepresentation on the part of the defendant, he cannot set up a lien, to which he might otherwise have been entitled. *Madden v. Kemperster*, 2 Camp. N. P. C. 12.

copied, though notice has not been given to the defendant to produce the certificate itself (23). In these cases, the nature of the action is sufficient notice to the defendant of the subject of inquiry.

In trover for a ship^a, the mere fact of possession as owner is sufficient *prima facie* evidence of ownership, without the aid of any documentary proof of title, as the bill of sale or ship's register, until such further evidence is rendered necessary in consequence of the adduction of some contrary proof on the other side (24).

As cases frequently occur where this further evidence is necessary, it may be proper to state the several legislative provisions on this subject.

All merchant ships employed upon the sea^x, whether in the coasting trade or distant voyages, having a deck, or being of the burthen of fifteen tons and upwards, and either built in Great Britain or Ireland, Jersey, Guernsey, and the Isle of Man, or the colonies, plantations, islands, and territories, under the dominion of his Majesty in Asia, Africa, or America, or taken in lawful war, and condemned as prize, (with the exception of vessels not exceeding thirty tons, and not having a whole deck, and solely employed in the Newfoundland fishery,) are required to be registered in

^a *Robertson v. French*, 4 East, 130. See also *Sutton v. Beck*, 2 Taunt. 292.

^x Vessels employed in inland navigation only are not within these statutes. *Laroche v. Wakeman*, Peake's N.P.C. 140.

(23) "Where a written instrument is to be used as a medium of proof, by which a claim to a demand arising out of the instrument is to be supported, there I admit the instrument itself must be produced, or notice to produce it must have been given to the defendant, before any evidence of its contents can be received; but this being an action of trover for the certificate of registry itself, I can see no sound reason why evidence should not be admitted of the existence of the certificate, in the same manner as evidence of a picture, or other specific thing, is constantly admitted where it is sought to be recovered in the same form of action." Per Rooke J. 3 Bos. and Pull. 146.

(24) Entries in the custom-house books of the port of London, and of the out-port to which a ship belongs, stating that she was transferred to A. by B. the original owner, was holden not sufficient evidence to prove that A. was liable as registered owner, there not being any proof to connect A. with the entries. *Fraser v. Hopkins* and another, C.B. Trin. T. 49 G. 3. 2 Camp. N.P.C. 176. See also *Tinkler v. Walpole*, 14 East, 226.

the manner, and according to the form, prescribed by stat. 26 G. 3. c. 60. And by the 17th section of the same statute it is enacted, "that when the property in any vessel belonging to any of his Majesty's subjects shall be transferred to any other of his Majesty's subjects, *in whole* or in part, the certificate of the registry of such vessel shall be truly and accurately recited, in words at length, in the bill of sale thereof, and that otherwise such bill of sale shall be void, to all intents and purposes."

The words of this section are general, and extend to all transfers of property in a ship to British subjects, whether the ship be in port or at sea.

In trover for a ship^r, it appeared that B., being indebted to the defendants in a large sum of money, gave them his promissory note, payable in three months; and by way of security executed to them a bill of sale of the ship in question (then at sea). The bill of sale was absolute on the face of it, but it did not contain a recital of the certificate of the registry, as required by the preceding section. At the time when B. executed this bill of sale, he deposited it, together with the grand bill of sale, with the defendants, who gave him an acknowledgment in writing, promising to return the same upon payment of the note. Before the note became due, B. committed an act of bankruptcy. The ship arrived in England some months afterwards, when the defendants took possession of her. It was holden, 1. that the transaction could not be considered as a mere deposit; it was an absolute bill of sale, and the acknowledgment signed by the defendants only gave a right of action to the vendor in case the bill of sale was not returned, but did not affect the *property* in the ship; and although the ship were at sea at the time when the bill of sale was executed, yet the statutes applied to transfers of ships at sea, and consequently the requisitions of the act not having been complied with, the bill of sale was void (25). 2. That the defendants had not any lien on the ship; for although as against the bankrupt they might have had such a lien, yet by means

y Rolleston v. Hibbert and others, 3 T. R. 406.

(25) A bill was afterwards filed by the defendants in the Court of Chancery, against the assignees of the bankrupt, praying to have a valid bill of sale executed to the defendants; but the bill was dismissed, on the ground that the defendant had no equitable title under the defective bill of sale. 9 Bro. Ch. C. 571. recognised in Camden v. Anderson, 5 T. R. 709.

of the bankruptcy the rights of third persons had intervened, and all the creditors of the bankrupt had an equitable lien on his estate, and were entitled to an equal distribution, and where two equities concur, the legal title must prevail. *truly and accurately.*]

A mere clerical mistake will not vitiate the bill of sale, where the certificate is in effect the same with the recital of it, and the error is apparent on the face of the instrument^a, but a substantial variance between the certificate of registry and the recital thereof in the bill of sale will be fatal^b.

By a subsequent stat. 34 G. 3. c. 68. s. 14. reciting, that upon the preceding clause doubts had arisen whether every transfer of property was required to be made by an instrument in writing, and whether contracts for the transfer might not be made without such an instrument, it is enacted, "That no transfer, or agreement for transfer, of property in any vessel, shall be valid for any purpose, either in law or equity, unless such transfer, &c. shall be made by bill of sale, or instrument *in writing*, containing such recital as is prescribed by that clause."

The 17th section of the stat. 26 G. 3.^b which requires the recital of the certificate of the registry in the bill of sale, does not require the *recital* of the *endorsements* made on such certificate upon every successive transfer; but by the very terms of the stat. 34 G. 3. c. 68. s. 15. the contract is void, unless such endorsements are made.

A bill of sale was executed^c, whereby the property in a ship was assigned to A. B., in trust for all the underwriters on the ship, by a certain policy, in proportion to their respective payments, without naming them. It was contended, that this bill of sale being in trust for *unnamed* persons, did not convey the legal interest in the ship to A. B., inasmuch as the policy of the register laws required that there should not be any distinction between legal and equitable titles, and consequently a person could not be the legal owner of a ship, unless he was beneficially interested therein, and his name appeared on the documents required by those statutes. But the court were of opinion, that supposing the bill of sale to be void, it was at most void only as to the objects of the trust, and so that the execution of

^a Rolleston v. Smith, 4 T. R. 161.

^a Westerdell v. Dale, 7 T. R. 306.

^b Capadoce v. Cadnor, 1 Bos. & Pal.

483.

^c Heath v. Hubbard, 4 East, 120. See Abbott's remarks, p. 68. and Currie v. Perry, 6 Ves. jun. 739.

the trust could not be enforced by law; but that there was not any such illegality affecting the trustee himself, as would prevent the property from vesting in him in the first instance.

Though a bill of sale by way of mortgage may be void^d, as such, for not reciting the certificate of registry, yet the mortgagor may be sued on a collateral covenant for the payment of the money contained in the same deed.

The further regulations prescribed by these statutes are as follows:

I. When the sale, or agreement for sale, of one or more shares in a ship, after registering, takes place *in the port to which the ship belongs* (26):

Such sale^a, &c. must be acknowledged by an endorsement (according to a prescribed form^f) on the certificate of the register, before two witnesses, expressive of the place of residence of the persons to whom the property is transferred; or if such persons are resident in a British factory^g, out of the king's dominions, the name of such factory; or if they are resident in a foreign town or city, and are not members of a British factory, the name of such town, &c. and of the house or partnership in Great Britain or Ireland, for or with whom they are agents or partners; and a copy of this endorsement must be delivered by the party to whom the transfer is made, or his agent^h, to the registering officer, who is required to cause an entry thereof to be endorsed on the affidavit, on which the original certificate of registry was obtained, and to make a memorandum of the same in the book of registry, and give notice thereof to the commissioners of customs.

II. When the sale, or agreement for sale, takes place during the absence of the ship from the port to which she belongs, so that an endorsement on the certificate cannot be immediately madeⁱ:

Such sale, &c. must be made by bill of sale, or other in-

^d Kerrison v. Cole, 8 East, 231.

^e Stat. 7 & 8 W. 3. c. 22. s. 21.

^f 24 G. 3. c. 68. s. 15.

^g 26 G. 3. c. 60. s. 16.

^h 24 G. 3. c. 68. s. 15.

ⁱ 24 G. 3. c. 68. s. 16.

(26) The port to which a ship belongs is ascertained by stat. 26 G. 3. c. 60. s. 5. to be, that "from and to which she shall usually trade, or being a new ship, shall intend to trade, and at or near which the husband or acting owner usually resides."

strument in writing, and a copy of the same (27) is to be delivered to the proper officer, and as in the preceding case an entry thereof, endorsed on the affidavit, a memorandum made in the book of registers, and notice given to the commissioners of customs; and *within ten days after the ship returns to the port to which she belongs*, an endorsement is to be made and signed by the owners or their agent, and a copy thereof delivered, as before mentioned, otherwise the bill of sale shall be void; and as before, an entry thereof is to be endorsed, and memorandum made.

The object of these regulations is, that by referring to the documents at the custom-house, persons may know to whom the property in the ship belongs at any time (28); and it is to be observed, that these provisions were intended to embrace every case of the transfer of property in a ship, and they apply to *any* alteration of property in the ship, whether the same be made by the transfer of the *whole*, or by the sale of *any share or number of shares* therein, amounting to less than the whole interest in such ship^a. But it is not necessary, that upon a transfer of a share in a vessel, the endorsement upon the certificate should express the share to be *all* the vendor's interest¹.

A bill of sale was executed by a sole owner of a vessel belonging to *the port of Sunderland*, to a vendee residing in London, at the time when the vessel was *in the port of London*; the requisites of the stat. 7 & 8 W. 3. c. 22. s. 21. only had been complied with, and not the requisites of the 15th or 16th sections of stat. 34 G. 3. It was holden, that the bill of sale was void; for if the ship were not so *absent*, &c. as to bring her within the 16th section, then the requi-

^a Bloxam v. Hubbard, 5 East, 427. in Hayton v. Jackson, 8 East, 511.

¹ Underwood v. Miller, 1 Taunt. R. 387.

(27) "The legislature in this case considering that the captain would do that which he ought to do, namely, have his certificate of registry on board with him, substitutes a copy of the bill of sale in the place of the endorsement on the certificate, still preserving the other regulations; and this is to serve till *within ten days after* the return of the ship to her port, when the endorsement before required is to be made, and the other acts to be done as before mentioned." Per Lawrence J. in Hayton v. Jackson, 8 East, 525.

(28) "The object of the legislature, in requiring the several things to be done which are mentioned in the 15th and 16th sections of the act, was to enable the public, to trace from port to port to whom the property in British ships belonged." Per Grist J. Hayton v. Jackson, 8 East, 522.

sites of the 15th section ought to have been complied with; and Lawrence J. observed, that it was not sufficient for the vendee to have complied with the requisites of the stat. 7 & 8 W. 3. c. 22. s. 21. which requires a register *de novo* upon any transfer of property to another port; because such transfer might take place without any change of the property to another, the property continuing in the same owner; that the object of the legislature there was to provide for the transfer of property in a ship from one port of registry to another; but it did not direct the mode in which the transfer of property from one person to another, in another port, was to be made; that direction was supplied by stat. 26 Geo. 3. and 34 Geo. 3.

The 16th section of the stat. 34 G. 3. c. 68. does not extend to the case of a ship, which having been registered at one port is sold, *while at sea*, to a purchaser residing at another port in this kingdom. In such case a registration *de novo* in the port to which the ship is transferred by the purchaser on her return is sufficient^a.

III. When the ship-owners are resident in a country not under the king's dominions^b, as members of a British factory, or are agents for, or partners in, a house or partnership, carrying on trade in Great Britain or Ireland, at the time when the transfer is made, so that the preceding requisites cannot be immediately complied with, six months are allowed after the transfer for complying with them; but it is required, that within ten days after the arrival of such owners or their agents in this kingdom, if the ship be in any port in this kingdom, if not, then within ten days after such ship shall so arrive, an endorsement shall be made by the owners or their agent, and a copy delivered as before-mentioned, otherwise the bill of sale to be void, and an entry must be endorsed, and memorandum made as before.

Having premised that one of the great objects of the preceding regulations is to prevent foreigners from being concerned in British ships, without being at the same time subject to the disadvantages attending that character, I shall subjoin some remarks founded on the judicial determinations which have been made on this subject.

1st, It is to be observed, that the preceding requisitions consist of two series of acts; one to be performed by the immediate parties to the sale or transfer; the other by the

^a Hubbard v. Johnstone, in Error, 10 84 G. 3. c. 68. s. 17.
 Exch. Ch., five judges against two.
^b Tawnt. 177.

public officers; and it has been holden^q, that although the provisions of the statutes be *imperative* as to the acts required to be done by the parties themselves, yet they are *directory* only as to the acts required to be done by the public officers, and consequently an omission of any of these requisites, on the part of the public officers, will not vacate the contract; *e. g.* the delivery of a copy of the bill of sale of a ship at sea to the registering officer is an act required to be done by the party to whom the transfer is made; if this act be omitted, the transfer is void (29); but if the officer neglect to endorse the entry of the transfer on the oath on which the original certificate of registry was obtained, and to make a memorandum thereof in the book of registry, and to give notice of the same to the commissioners in London, such omission on the part of the officer will not vacate the contract^q.

2dly, Where there is not any time limited for the performance of the act required to be done by the party, (as *e. g.* under the 16th section of stat. 34 G. 3. c. 68. no time is limited for the delivery of the copy of the bill of sale by the party to whom the transfer is made, to the registering officer^r;) the statute is not to be construed as if it had directed that the act should be done *within a reasonable time*, but it must be understood as enacting that the instrument shall have no operation or effect, until the requisites of the statute shall have been complied with.

3dly, Although the bill of sale^s, or other such instrument, has its operation from the time when the requisites imposed on the parties to the sale have been complied with, yet no relation will be allowed to hold good, so as to make the conveyance effectual from any antecedent time.

p Heath v. Hubbard, 4 East, 110.
Ratchford v. Meadows, 3 Esp.
N. P. C. 69.

q Underwood v. Miller, 1 Taunt. R.
387.

r Moss v. Charnock, 2 East, 405. But
see the remarks of Wood B. in Hub-
bard v. Johnstone, 3 Taunt. 208.

s Per Lawrence J. delivering the opi-
nion of Le Blanc J. and himself, in
Moss v. Charnock, 2 East, 405. The
same point was also admitted in
Young v. Brander, 6 East, 10.

(29) The purchaser having omitted to deliver the copy of the bill of sale, cannot make a title to the ship *per saltum*, by getting her registered ~~de novo~~ in another port, where he ~~resided at the time~~. for whatever may amount to a transfer of a ship to another port within the meaning of the statutes, in no case can such transfer be made by one who has no interest in the ship. Heath v. Hubbard, 4 East, 110.

In an action of trover for a ship, brought by the plaintiffs, assignees of B., a bankrupt, against the defendant, who claimed two-third parts of the ship, as the vendee of B. before his bankruptcy; it appeared that B., being indebted to the defendant in more than the value of his share of the ship, in August, 1800, made a bill of sale thereof to the defendant, and sent it to him, but the defendant declined accepting it until the 15th of November following, and on the 19th November, B. became a bankrupt. On the 5th of December, and not before, the requisites of the stat. 34 G. 3, c. 68. s. 16. in respect of the transfer of ships not in port were complied with, and within ten days after the return of the ship to port, an endorsement was regularly made on the certificate of the registry, and the other requisites of the act complied with. It was holden, that the bill of sale, made by the bankrupt to the defendant, had no operation, until the requisites of the statute were complied with, that is, not until after the bankruptcy; that it was contrary to the policy of the register acts to permit the conveyance to be made effectual by relation from any antecedent time, and consequently that the assignees were entitled to recover.

4thly, These statutes relate to transfers made by the act of the party only*, viz. from a *former owner*, to a new owner; and where the transfer is capable of being effectuated in the ordinary way, by the mere operation of an instrument of assignment from the one party to the other, and do not relate to transfers deriving their effect by peculiar provision or operation of law, as assignments by commissioners of bankrupt to assignees under the bankrupt laws do.

Lastly, It will be observed, that the register is directed to be kept not for the sake of the persons making or the persons accepting the transfer; but for purposes of public policy; hence, to charge a person as owner of a ship, it is not sufficient merely to produce the register; for that cannot be made evidence, even *prima facie*, unless the person intended to be charged is connected with the entry, and it is shewn that every thing has been done by his authority or adoption.

It remains only to mention the cases in which the statutes require or permit the officers to make a registry de novo, and these are as follow:

* *Moss v. Chaswell*, 5 East, 399.

* *Blomay v. Hubbard*, 5 East, 422.

* *Frazer v. Hopkins*, 2 Comp. N. P. C. y Abbott, ed. 2d. 60.

170. and 2 Tenn. 3. B. C. Tindler

v. Walpole, 14 East, 226.

First, where the old certificate has been lost or mislaid^a; *2dly*, where the certificate is wilfully detained by the master^a; *3dly*, where, after a transfer of part of the property in the same port, the owners of the part not transferred desire a new register^b; *4thly*, where the ship is altered in form or burthen^c; and *5thly*, upon any transfer of property to another port^d. The statute of King William also required a new register in case of a change of the ship's name^e, but this change is now altogether prohibited^f.

The compiler trusts, that an anxious desire on his part to contribute to the better understanding these important statutes, (which, as was admirably observed by a learned judge^g, are the bulwarks of the commerce of the country, and the great tower of our naval strength,) will afford an apology for the space occupied by the preceding remarks, in a work which professes to be an abridgment. He now returns to the more immediate subject of this section, viz. the evidence necessary to maintain an action of trover.

To determine what evidence will be sufficient to prove a conversion in the defendant^h, it must be known in what manner the goods came to his hands; for if they came to his hands by delivery, finding, or bailment, an actual demand and refusal ought to be proved; but proof of a tortious taking will supersede the necessity of proving a demand and refusal; for where the taking is unlawful, it is of itself a conversion; so likewise, if an actual conversion be proved, it is not necessary to prove a demand and refusal.

A mere non-delivery of goods, which have been placed in the defendant's hands for a specific purpose, will not amount to a tortious conversion. Henceⁱ, where goods have been delivered to a manufacturer, in order that he may do something to the goods in the course of his business, and then return them; if the manufacturer, upon being applied to for the goods, merely makes excuses for not having returned them, and does not absolutely refuse to deliver them, *trover* cannot be maintained; the proper remedy is an action of assumpsit for non-performance of the contract.

^a 26 G. 3. c. 60. s. 22.

^b 28 G. 3. c. 34. s. 14. ^c 34 G. 3. c. 68. s. 19.

^d 34 G. 3. c. 68. s. 21.

^e 26 G. 3. c. 60. s. 24.

^f 7 & 8 W. 3. c. 22. s. 21.

^g lb.

^h 26 G. 3. c. 60. s. 19. See also stat.

ⁱ 34 G. 3. c. 68. s. 22. which appears to provide for another case.

^j Eyre C. J. 1 Bos. & Pul. 485.

^k Per cur. in Bruen v. Roe, 1 Sidr. 364.

^l Severin v. Keppell, Middx. Sittings.

^m E. 43 G. 3. B. R. Lord Ellenborough.

ⁿ C. J. 4 Esp. N. P. C. 157.

A trader on the eve of bankruptcy made a collusive sale of his goods to A. It was holden, that the assignees could not maintain trover for the goods against A., without proving a demand and refusal^k. But the sale of a ship, which was afterwards lost at sea, made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, has been holden to be a sufficient conversion so as to enable the assignees to maintain trover, without proving a demand and refusal^l. N. The defendant sold the ship by public auction, and afterwards assigned it to the vendees, who sent her to sea.

A demand and refusal is only evidence to induce a jury to presume a conversion^m; and, therefore, if the jury find a special verdict, that there was a demand and refusal, the court cannot adjudge it to be a conversion.

A demand and refusal is not evidence of a conversionⁿ, where it is apparent that the defendant has not been guilty of a conversion; as in the case of the defendant having cut down the trees of the plaintiff, and left them lying in the plaintiff's ground; for in such case it is clear that there has not been any conversion, if they continue there as before. If A. into whose possession goods happen to come, being ignorant that B. is the real owner, refuses to deliver them to B., until he proves that he is the real owner; such qualified refusal is not evidence of a conversion^o. In order to make a demand and refusal sufficient evidence of a conversion, the party, when he refuses, must have it in his power to deliver up or to detain the article demanded. Hence, where in trover for a deed^p, the evidence was, that when the deed was demanded from the defendant, he said he would not deliver it up, but that it was then in the hands of his attorney, who had a lien upon it. This was holden insufficient.

In trover against a carrier, a refusal to deliver is not evidence of a conversion, if it appears clearly that the goods have been lost through negligence^q; but if that does not appear, or if the carrier had the goods in his custody when he refused to deliver them, it is good evidence of a conver-

^k *Nixon v. Jenkins*, 2 H. Bl. 135.

^l 5 East, 407.

^m *Per Sir E. Coke C. J.* 10 Rep. 56. b. 57.

ⁿ *Per cur.* 2 Mod. 245.

^o *Green v. Dunn*, 3 Camp. N. P. C. 215. n. *Ld. Ellenborough C. J.* See

also to the same effect, *Dict. per*

Coke C. J. 2 Bulst. 312. *ante p.* 1201.

and *Ld. Kenyon C. J.* in *Solomon*

v. Dawes, 1 Esp. N. P. C. 33.

^p *Smith v. Young*, 1 Camp. N. P. C. 439.

^q *Anon.* *Salk.* 655. *Ross v. Johnson*,

5 Burr. 2225. *Kirkman v. Har-*

greaves, *ante*, p. 377.

sion^r (30). But he may give in evidence the detaining of the goods for his hire^r. So he may give in evidence, that the goods were stolen^r; for then he is not guilty of a conversion, though he will be liable in an action on the case to make compensation for the loss of the goods.

If A. sends goods by B., a common carrier, to be delivered to C., proof that B. asserted he had delivered the goods to C., whereas in truth C. had never received them, is not sufficient evidence of conversion to support trover against B.

So in trover for a horse in an inn-keeper's possession, refusal is not a conversion, or evidence of a conversion, unless the plaintiff tender a sum sufficient for the keep of the horse, and the jury is to judge of the sufficiency of the tender^r (31).

But if A. put a horse to pasture with B., and agree to pay him a certain sum per week as long as he remains at pasture, and afterwards sell him to C., who brings trover against B.; B. cannot detain the horse against C. the purchaser, until he be paid, but must have recourse to his action against A.

- r. Salk. 655. Dewell v. Moxon, 1 t George v. Wyburn, 1 Rol. Abr. 6.
Taunt. 391. S. P. (L) pl. 4.
q Skinner v. Uphaw, 2 Ld. Raym. u Attersol v. Briant, 1 Camp. N. P.
759. The case of the Exeter car- C. 409. Ellenborough C. J.
rier, cited by Holt C. J. in Yorke v. x Ason. 2 Show. 161. per North C. J.
Grenough, Ld. Raym. 867. y Chapman v. Allen, Cro. Car. 371.

(30) "If a carrier says he has the goods in his warehouse, and refuses to deliver them, that will be evidence of a conversion, and trover may be maintained, but not for a bare non-delivery, without any such refusal." Per Lord Ellenborough C. J. in *Severin v. Keppell*, 4 Esp. N. P. C. 157.

(31) "If a man brings his horse to an inn, and leaves him there in the stable without any special agreement as to what he is to pay, the innkeeper is not bound to deliver the horse until the owner has defrayed his charge for the horse; but he may justify the detainer of the horse for his food and keeping; and after the horse has eat as much as he is worth, the innkeeper, upon a reasonable appraisement, may sell him, and it is a good sale in law. But if there be a special agreement, that the owner of the horse shall pay a certain sum for the keep, in that case, although the horse eat out double his price, the innkeeper cannot sell him." Per Popham C. J. 9 Yelv. 67. But see *Jones v. Pearls*, Str. 506, where it was held, that an innkeeper cannot sell the horse of his guest, except in the city of London.

Possession ought to be proved in the defendant himself^a; for delivery to a servant is not sufficient, if the goods do not come to the hands of the defendant, unless the servant be employed by his master to receive goods for him, and the goods are delivered in the way of his trade; as if a pawn be delivered to a pawnbroker's servant^b.

Of staying the Proceedings—Costs—Judgment.

Formerly, if the defendant was desirous of staying the proceedings against him, by bringing the subject matter of the action into court, and undertaking to pay the costs incurred, the court refused to listen to the application^b, unless the action was brought for money^c, observing, that they had not any warehouse for the purpose.

But of late years it has been usual to grant applications of this kind, when a proper case has been brought before the court^d (32). But not where it appears that the goods are altered and of less value than they were when taken^e (33).

Costs.

The action of trover not being within the stat. 22 & 23 Car. 2. c. 9.^f the recovery of damages to any amount will entitle the plaintiff to costs by virtue of the stat. of Gloucester.

The stat. 8 & 9 W. 3. c. 11. s. 1.^g which gives costs to

^a Bull. N. P. 44.

^b Jones v. Hart, Salk. 441.

^c Salk. 597. Bowington v. Parry, Str.

829. Ollivant v. Perineau, Str. 1191.

^d Wils. 33. S. C. Harding v. Wil-

kin, Bay. 120.

^e Anon. Str. 349.

^f Per Ld. Kenyon C. J. 7 T. R. 54.

Everard v. Lathbery, Bull. N. P. 49.

^g Keyden v. Batty, Warren, 294. Fish-

er v. Preece, 3 Burr. 1363.

^h Per cur. in Ven v. Phillips, Salk. 208.

ⁱ Marriner v. Barret, P. 1 G. 2. cited in

Jagle v. Wordworth, 3 Burr. 1296.

(32) See Pickering v. Truste, 7 T. R. 53. where this doctrine was extended to trespass for taking goods.

(33) Where the goods are ponderous, the court will grant a rule to shew cause, why, on the delivery of the goods to the plaintiff, and on payment of costs, the proceedings should not be stayed. Cooke v. Helgate, C. B. Barnes, 281. ed. 2d. Watts v. Phipps, B. R. E. 7 G. 3. Bull. N. P. 49.

persons who are improperly made defendants in actions or complaints of trespass, assault, false imprisonment, or ejectio firmæ, does not extend to actions of trover.

Judgment.

The judgment in this action is for the recovery of damages only^b, and in this respect it differs from the judgment in the analogous action of detinue, which is for the recovery of the *goods in question*, or the value thereof, if the plaintiff cannot have the goods.

^b Knight v. Bourne, Cro. Eliz. 116.

CHAP. XL.

USE AND OCCUPATION.

FORMERLY an action of assumpsit^a for rent arrear upon a parol lease for years could not have been maintained, either pending^b, or after the expiration of the term^c, because it was considered as a real contract: the only remedies were by distress or action of debt. But on a mere promise to pay a sum of money^d, or so much as the plaintiff deserved to have^e, in consideration of the plaintiff's permitting the defendant to occupy lands, &c. an action of assumpsit might have been maintained by the common law. In this case the objection as to the contract being *real*, was removed by considering the permission to occupy as not amounting to a lease, and the mere promise to pay a sum of money in consideration of such permission, as not amounting to a reservation of rent.

In order, however, more effectually to obviate the difficulties which occurred in the recovery of rent, where the demise was not by deed, it is enacted by stat. 11 G. 2. c. 19. s. 14. "that landlords, *where the agreement is not by deed*, may recover a reasonable satisfaction for the lands, tenements, or hereditaments, held *or* occupied by the defendant, in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action, any parol demise, or any agreement, (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered."

It will be observed, that under this statute^f, a landlord

^a Brett v. Read, Sir W. Jones, 329. Cro. Car. 343.

^b 1 Rol. Abr. 7 (O) pl. 1.

^c Ib. pl. 2. see also Green v. Harrington, Hob. 384. Hutt. 34. S. C.

^d Dartnall v. Morgan, Cro. Jac. 593. Chapman v. Southwicks, 1 Lev. 304.

Johnson v. May, 3 Lev. 150. Adjudged on demurrer.

^e How v. Norton, 1 Lev. 179. Mason v. Welland, Skm. 233. 242.

^f Per Eyre C. J. delivering the opinion of the Court in Nash v. Tatlock, 2 H. Bl. 323.

who has rent owing to him is allowed to recover, not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises, which have been holden and enjoyed under the demise, by the action for the use and occupation; and it is provided on his behalf, that if the demise be produced against him, it shall not defeat his action, as it would have done before the statute; but the fixed rent shall only be used as a medium, by which the uncertain damages to be recovered in this form of action shall be liquidated. A reasonable satisfaction for the use and occupation is the thing intended to be given; the form of action marked out (being enlarged by a necessary construction, so as to be allowed to be maintained without an express promise) is the proper form in which such reasonable satisfaction is to be recovered; but the reasonable satisfaction which in its own nature must apply to something specific by which it can be estimated, being here given for use and occupation, and for nothing else, it is a remedy which, in its own nature, is not co-extensive with a contract for rent, nor does it seem to have been within the scope and purview of the statute to make this remedy co-extensive with all the remedies for the recovery of rents claimed to be due by the mere force of the contract for rent. The statute meant to provide an easy remedy in the simple cases of actual occupation, leaving other more complicated cases to their ordinary remedy.

Since this statute, the action for use and occupation has been resorted to as one of the most convenient remedies for the recovery of rent arrear, in cases to which the statute applies. The plaintiff usually declares in the form of a general indebitatus assumpsit with a quantum meruit (1). Hence the declaration is very concise. It has been, however, the practice to state in the declaration, the parish in which the land, messuage, &c. occupied by the defendant, are situated; and plaintiffs have very often been nonsuited for a variance between the parish mentioned in the declaration and that proved in evidence². But it is conceived, that, as in the case of *King v. Fraser*, 6 East, 348. and ante p. 554. it was determined, that in debt for use and occupation there was not any necessity for naming the parish, because there was not any locality in the action; so in indebitatus assump-

g See *Wilson v. Clark*, 1 Esp. N. P. C. 273.

(1) As to the action of debt for use and occupation, see ante, tit. Debt, p. 563.

that the libel doctrine would be laid down, for the same reason. It may be prudent, therefore, in all cases, to bring naming the parish, in order to avoid any objections on the ground of a variance.

It will be proper to remark, that the statute provides a remedy, in such cases only, where the agreement is not by deed; but it has been holden, in one case¹, where the defendant held under a mere agreement for a lease, which did not amount to an actual demise, that the plaintiff might maintain an action for use and occupation, although such agreement was by deed.

In an action for use and occupation of apartments in the plaintiff's house during half a year², it appeared that the rent was claimed in consequence of the defendant having neglected to give a notice to quit: the defence set up was, that the plaintiff, after the defendant had quitted, had put up a bill at the window; but Lord Kenyon C. J. expressed an opinion, that the defence insisted on would afford no answer to the plaintiff's action. It was for the benefit of the defendant that the apartments should be let, nor would he infer from the circumstances of the party's endeavouring to let them, that the contract was put an end to; that there must be other circumstances to shew it, and not merely an act of so equivocal a kind. That as the plaintiff had proved the taking the premises, and the payment of the rent, it was incumbent on the defendant to prove that the tenancy was determined, by express evidence. The defendant thereupon proved, that a notice to quit had been given, in which the plaintiff had acquiesced, and obtained a verdict.

A tenancy from year to year³ created by parol, is not determined by a parol license from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premises accordingly. The statute of frauds requires a deed or note in writing, or a surrender by operation of law.

The words of the statute are, that the plaintiff may recover a reasonable satisfaction for the lands, &c. held or occupied by the defendant, in an action for use and occupation. An occupation by the tenant of the defendant, as far as respects the plaintiff, an occupation by the defendant himself; hence⁴, If A. agree to let his lands to B., who

¹ *Kirtland v. Pounsett*, 1 Taunt. 570. ² *Redpath v. Roberts*, 3 Esp. N. P. C. 925.
³ *Elliot v. Rogers*, 4 Esp. N. P. C. 59. ⁴ *Mollett v. Brayne*, 2 Camp. N. P. C. 104.

⁵ *Bull v. Sibbs*, 1 T. R. 527.

permits C. to occupy them, A. may recover the rent in an action against B. for the use and occupation.

Where the defendant has not obtained possession under the plaintiff, the plaintiff can only recover rent from the time he has had the legal estate in him, although he may have had the equitable estate long before. The defendant entered upon a leasehold cottage under J. S., who soon after mortgaged it to W. S., and in 1806, assigned the equity of redemption to the plaintiff^a. On the 18th of July, 1808, W. S. assigned the legal estate in premises to the plaintiff. The defendant continued in possession till the Michaelmas following, and had paid no rent for the last two years. It was contended, that although a person having the equitable estate only, perhaps could not maintain use and occupation without privity of contract, yet the plaintiff being now clothed with the legal estate, his title would have reference to the time when the equity of redemption was assigned to him, so as to entitle him to two years' rent. But Lord Ellenborough clearly held, that he could only recover rent for the period between the 18th of July and Michaelmas-day, 1808. His lordship likewise ruled in the same cause, that the defendant, who just before he quitted had been distrained upon by the ground landlord for several years' ground rent, amounting to a much larger sum than was due to the plaintiff, could only set off a part of this sum proportioned to the period during which the plaintiff had the legal estate; and that the fact of the plaintiff having brought an ejectment for the same premises, laying a demise on the 18th July, 1808, was no bar to the present action, but was only matter of special application to the court.

In an action against the assignees of B.^a a bankrupt, the declaration stated, that the defendants on such a day were indebted to the plaintiff in —*l.* for the use and occupation of two houses, &c. before that time occupied *as well by the bankrupt, whose estate therein the defendants afterwards had, as by the defendants, at their special instance and request*, for one year then elapsed, and as tenants thereof respectively, to the plaintiff, and by his permission. The second count was upon a quantum meruit, to the same effect as the indebtedatus assumpsit. The facts of the case were, that after B. had occupied the premises during part of the year, under an agreement to pay —*l.* a-year for them, he became a bank-

^a Cobb v. Carpenter, 2 Camp. N. P. G. 13. n.

^o Naish v. Tatlock and others, assignees of Lediard, a bankrupt, 2 H. Bl. 319.

rupt, whereupon the defendants, his assignees, entered into possession and continued in the possession for the remainder of the year. A proportion of the annual rent for that part of the year during which the defendants were in possession, was paid into court. It was holden, that if the plaintiff could recover at all in this form of action against one person for the use and occupation of another, (as to which the court would not give any opinion,) it must be on the ground of that occupation having been permitted at the defendant's request, and that request must be proved; that the words "at the special instance and request of the defendants," were in this case words of substance and operative, connecting the occupation of the defendants, for which they were bound to make a satisfaction, with the occupation of B., a stranger, for whose occupation, *prima facie* at least, the defendants were not liable; that in point of fact it was not at the request of the defendants that B. had been permitted to occupy; the defendants had no relation to B., but as his assignees, and that relation did not commence until the close of B.'s occupation; that relation, therefore, alone could not have the effect of making them personally liable to answer for his occupation before his bankruptcy. The averment, that he had been permitted to occupy "at the request" of the defendants, was therefore substance, and not mere form, and as the plaintiff had failed in the proof of it, he was not entitled to recover from the defendants the rent due for B.'s occupation.

The defendant contracted to purchase of the plaintiff a lease of a house*, and on payment of the purchase money, was permitted to take possession. A few months afterwards, the plaintiff not having made out a good title, defendant declared his intention to rescind the contract; he accordingly quitted possession of the house, and brought an action for money had and received against the plaintiff, and recovered the whole of the purchase money and the expenses of investigating the title. The plaintiff then brought an action for use and occupation against the defendant; but it was holden, that it would not lie; Mansfield C. J. observing, that a contract could not arise by implication of law under circumstances, the occurrence of which neither of the parties ever had in their contemplation, that if no money had been paid, perhaps it might be a different question; but if a person paid his money, and was so unwise as

* Kirtland v. Founsett, 2 Taunt. 145. But see Hearn v. Tomlin, Peake's, N. P. C. 192.

to take possession without a title, justice required that the one party should take back his money, and the other his house.

An action for use and occupation may be maintained against a tenant from year to year upon an agreement by him to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued (2).

Declaration.—In consideration that the defendants^a, on the 26th November, 1801, had become and were tenants of a messuage under a yearly rent of —/., the defendants promised to pay the same during the continuance of the tenancy, with an averment that the defendants continued tenants from the time of making the promise hitherto, that the defendants did not, during the continuance of the tenancy, pay the rent; that on the 29th September, 1803, half a year's rent was in arrear.—2d Count. *Indebitatus assumpsit* for use and occupation.—3d. Count. *Quantum meruit*.—Plea, That the defendants were traders, and committed an act of bankruptcy on the 2d of April, 1803; that a commission issued on the 5th of May following; that an assignment was executed on the 21st May of the interest of the defendants in the messuage to A. and B., who became and were on the last-mentioned day, and thence until the rent became due, continued to be possessed of and occupied the messuage; on special demurrer it was holden, that as it had been determined in *Auriol v. Mills*^b, that a bankrupt lessee, though out of possession, was still liable upon his *covenant to pay*; so here the defendant was liable on his *agreement to pay the rent*; that there was not any distinction in this respect, between an agreement and a covenant, which is an agreement under seal, except as to the form of the remedy upon it; that the case of *Auriol v. Mills*, to which this was perfectly analogous, did not turn on any particular effect of a covenant under seal, but on its being the personal agree-

^a *Boot v. Wilson*, 8 East, 311.
^b 4 T. R. 34.

^a But see stat. 49 Geo. 3. c. 121. s. 12.
ante, p. 226.

(2) But debt does not lie against a bankrupt on the reversion of a lease, for rent accruing after the commissioners' assignment; the lessor's assent to such assignment being virtually included in the act of parliament authorising the assignment of the bankrupt's estate. *Wadham v. Marlowe*, Mich. 25 G. 3. B. R. 8 East, 314, n.

ment of the parties; and although it was objected, that if the action was holden to lie, the consequence would be, that there must be an apportionment of the rent, yet the court observed, that the landlord had nothing to do in this case with the question of apportionment of the rent; for he proceeds against the parties with whom he made the agreement, which has been broken; the court, therefore, said nothing of his right to recover against the assignees.

Bringing an ejectment will not be a bar to an action for use and occupation for rent due before the day of the demise laid in the declaration in ejectment^t; but rent due subsequent to that day cannot be recovered in an action for use and occupation^u.

The defendant, in this action, will not be allowed to impeach the title of the plaintiff, by whose permission he entered upon and occupied the tenement demised. Hence a plea of *nil habuit in tenementis*, cannot be pleaded^x; and this rule holds even where the declaration does not state the tenement demised to belong to the plaintiff, provided it is stated, that defendant occupied by permission of the plaintiff^y. Upon the same principle it has been holden, that *nil*

^t *Birch v. Wright*, 1 T. R. 378.

^u *Per Buller J. S. C.* 1 T. R. 388.

^x *Richards v. Holditch*, (3) H. 13

Geo. 3. cited in *Lewis v. Wallis*,

Say, R. 13.

^y *Richards v. Holditch*, H. 13 Geo.

3. cited in *Lewis v. Wallis*, Say,

R. 13. 1 Wils. 314. S. C.

(3) The case of *Richards v. Holditch* was this:—Error to reverse a judgment in action on the case upon several promises, in Steppny Court, because the plaintiff declared, that in consideration he permitted the defendant to enjoy several houses, without shewing what title he had. *Yelv.* 227, 8. *Glasse's case*, and 3 *Lev.* 193. *Aylet v. Williams* were cited. E contra it was said, that permission to enjoy without shewing any title, was a sufficient consideration. 1 *Leon.* 43. *Cro. Jac.* 598. 1 *Lev.* 304. 3 *Lev.* 150. An objection was made to the plea, that this action being founded on a collateral promise, and not on a contract for the rent, *nil habuit in tenementis*, as was pleaded in this case, was not a good plea, and of that opinion was the whole court; for if any one enjoys a benefit at his request, and by permission of another, that is a sufficient consideration for an assumpsit. *N. Chapple* cited a case as ruled by Lord Hardwicke, where A., without title, gave possession of a house to B.: C, the owner, brought assumpsit for the use and enjoyment; but because B. did not receive his possession from C, nor, anywise occupied under him, Lord Hardwicke held the action not maintainable by him.

habuit in tenementis cannot be given in evidence in this action.

In an action for use and occupation of glebe lands^a, it appeared, that the former incumbent had let the lands in question to the defendant, who had continued tenant to the present incumbent, the plaintiff, and had paid him half a year's rent for the same. This action being brought for some arrears of rent, the defendant offered to give evidence of the plaintiff's having been simoniacally presented, of which, as it was stated, the defendant was ignorant, when he paid the former rent; but Lord Kenyon C. J. refused to receive this evidence, being of opinion that the case fell within the common rule, that a tenant should not be permitted to impeach the title of his landlord in an action for use and occupation. There was a verdict accordingly for the plaintiff. The court of B. R., on motion for a new trial, concurred in opinion with the C. J.

Neither will a defendant^a, who has obtained possession under the plaintiff, be permitted to shew that the plaintiff's title has expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. Proof of payment of rent to a third person claiming title is not sufficient, without a formal renunciation of the plaintiff's title. The judge will not permit the amount of the property-tax to be deducted at *Nisi Prius* from the rent due^b.

In an action for use and occupation^c; if it appear that the premises were let to the defendant for the purposes of prostitution, the action cannot be sustained, the contract being *contra bonos mores*.

Assumpsit for use and occupation^d; on examination of a witness who proved the occupation by defendant, it appeared that there had been an agreement in writing, but not stamped. It was contended by plaintiff's counsel, that the agreement, not having been stamped, was not binding on the parties, and that therefore the plaintiff might waive this, and go into evidence generally for use and occupation. It was insisted for defendant, that it appeared that plaintiff held under a written contract, and therefore he was bound to give it in evidence. *Eldon C. J.* was of this opinion, observing, that this being a specific contract between plaintiff and de-

^a *Cooke, Clerk, v. Loxley*, 5 T. R. 4.

^b *Balls v. Westwood*, 2 Camp. N. P. C. 11.

^c *Potcock v. Eustace*, 2 Camp. N. P. C. 101. *Ellenborough C. J.*

^d *Girarday v. Richardson*, 1 Esp. N. P. C. 13.

^e *Brewer v. Palmer*, 2 Esp. N. P. C. 213.

defendant, the plaintiff is bound to shew what that contract was; it may contain clauses which may prevent plaintiff from recovering; others for the benefit of defendant, which he had a right to have produced; but the contract not being stamped, it could not be given in evidence (4), therefore the plaintiff must be nonsuited.

(4) *R. v. the Inhabitants of St. Paul's, Bedford*, 6 T. R. 452. S. P.

CHAP. XLI

WAGER.

- I. *Introduction—Of Legal Wagers—Form of Action.*
 II. *Of Illegal Wagers.*

I. *Introduction—Of Legal Wagers—Form of Action.*

Introduction.—It has frequently been lamented, that idle and impertinent wagers between persons not interested in the subject or event were ever considered as valid contracts. Grave and learned judges have thought that it would have been more beneficial for the public, if it had been originally determined, that an action would not lie for the enforcing the payment of any wager. Actions, however, on wagers relating to a variety of subjects, having been entertained under certain restrictions, and the legislature not having as yet interposed to prohibit them entirely, it may be proper to state in what cases an action will lie for enforcing the payment of a wager, and in what such action cannot be maintained.

Of Legal Wagers.—In *Andrews v. Herne*^a, where a wager was laid, that Charles Stuart would be king of England within twelve months next following, he then being in exile, it was holden good. (b) So in the *Earl of March v. Pigot*^b,

^a 1 Lev. 33.

^b 5 Burr. 9802. But see the observation of Heath J. on this case, in 3

Camp. N. P. C. 172. viz. that it was a case not to be cited, being of very doubtful authority.

(1) But as it was justly observed, by Lord Ellenborough C. J., in *Gilbert v. Sykes*, B. R. Trin. T. 52 G. 3. the illegality of this wager, on the ground of its being against public policy, does not appear to have been brought under the consideration of the court. In *Gilbert v. Sykes*, the defendant, in the year 1802, in consideration of one hundred guineas, agreed to pay the plaintiff a guinea a day

where two heirs apparent betted on the lives of their respective fathers, no objection was made to the subject of the wager; and it was further holden, that the circumstance of one of the fathers being dead at the time when the wager was made, but of which circumstance the parties were ignorant, did not affect the validity of the wager. In *Murray v. Kelly*, B. R. M. 25 Geo. 3. on a rule to shew cause why the defendant should not be discharged on filing common bail, on the ground that the action was on a wager, whether A. kept a military academy at such a place, or not; Lord Mansfield said, that as it was merely a wager on a private event, he saw no reason why it should not be considered as a legal debt; and the rule was discharged. In *Jones v. Randall*, Cowp. 37. a wager, on the event of an appeal to the House of Lords from the Court of Chancery, was holden good, the wager having been made between parties who could not in any degree bias the judgment of the house, and there not being any fraud or colour in the case. So in *Good v. Elliott*, 3 T. R. 693. where the subject of the wager was, whether one S. T. had or had not, before a certain day, bought a waggon, lately belonging to D. C., it was holden good, per three justices; but Buller J. was of a different opinion, 1st, on the ground that two persons shall not be permitted, by means of a voluntary wager, to try any question upon the right or interest of a third person; and, 2dly, that all wagers, whether in the shape of a policy or not, between parties not having any interest, were prohibited by stat. 14 Geo. 3. c. 48. So in *Hussey v. Crickitt*,

c Trin. T. 30 G. 3. B. R.

d C. B. E. T. 52 G. 3. 3 Camp. N.P.C.
169.

during the life of Bonaparte. The defendant paid the guinea a day for some years; but then desisted. The action was brought to recover the arrears. The jury having found a verdict for defendant; on motion for a new trial, it was contended, in support of the verdict, that the wager was illegal, inasmuch as it had a tendency to create an interest in the plaintiff in the life of a foreign enemy, and which, in the case of invasion, might induce him to act contrary to his allegiance. The court, being of opinion that the justice of the case had been satisfied, refused to disturb the verdict; and Lord Ellenborough C. J. expressed a strong opinion against the legality of the wager, as well on the ground before-mentioned, as also on the ground, that the party suffering under such a contract, might be induced to compass and encourage the horrid practice of assassination, in order to get rid of a life so burthensome to him.

a wager of a *rump and dozen*, whether the defendant was older than the plaintiff, was holden to be legal.

With respect to the form of declaring on a wager, it may be observed, that before the time of Holt C. J. it was a question, whether a general indebitatus assumpsit would not lie for a wager; it was, however, finally agreed, that it would not^a; but although an action does not lie in that particular form, yet a special assumpsit on the wager itself, laid by way of mutual promises, may be maintained.

II. Of *Illegal Wagers*.

1. **WAGERS** are illegal which are specially prohibited by positive statute.

A policy of insurance is, in the nature of it, a contract of indemnity, and of great benefit to trade. But the use of it was perverted by its being turned into a wager. To remedy this evil, the stat. 19 Geo. 2. c. 37. was made, which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perversion of this species of contract, and, among others, that of gaming or wagering, under pretence of insuring vessels, &c. proceeds under general words to prohibit all contracts of assurance by way of gaming or wagering.

An agreement, in writing, was made^f, that plaintiff should pay the defendant 20*l.* at the next port a ship should reach; in consideration whereof, the defendant undertook that the ship should save her passage to China that season; and if she did not, then he would pay the plaintiff 1000*l.* at the end of one month after she arrived in the Thames. It was holden, that this agreement being made without reference to any property on board, although it appeared that the plaintiff had some little interest in the cargo, was a wagering policy within the meaning of the preceding statute.

A similar provision has been made with respect to ~~insurance~~ on lives, in consequence of a ~~mischivous kind of~~ gaming, which had been introduced by such ~~insurance~~, wherein the assured had no interest. To remedy this evil,

^a Jackson v. Colegrave, on error, Exch. f Kent v. Bird, Cowp. 583.

Ch. H. 6 W. 3, Carth. 338. Bovey v. Castleman, 1 Ld. Raym. 69.

it was enacted by stat. 14 Geo. 3. c. 48. s. 1. "That insurances made on the life of any person, or any other event, wherein the person for whose use such policy shall be made, shall have no interest, or by way of gaming or wagering, shall be void." The second section directs, that in all policies on lives or other events, the names of the persons interested shall be inserted.

A wager in the form of a policy, between two uninterested persons upon the sex of a third^s, is within the meaning of the preceding statute, and, consequently, illegal. In *Good v. Elliott*, 3 T. R. 693. Kenyon C. J. Grose and Ashhurst Js. were of opinion, that the preceding statute was confined to *policies* of insurance, and that from the words used in the second clause, it was apparent, that the legislature had *written* instruments only in contemplation. But the construction which was put by Buller J. on this statute was, that it had nothing to do with what, in true sense and meaning of the word, is a policy, that is, a mercantile policy made on interest, but that it prohibited *all wagers* made on any event in which the parties had not any interest.

By stat. 16 Car. 2. c. 7. s. 2. "The winner of any money, or other valuable thing, *by deceit*, in playing at cards, dice, tables, tennis, bowls, kittles, shovel-board, or in cock-fightings, horse-races, dog-matches, foot-races, or other games; or by bearing a part in the stakes, or by betting on the sides of such as play, ride, or run, shall forfeit treble the value." By the third section all securities, and promises given or made, for the payment of sums exceeding 100*l.*, which have been lost at one time, by playing at any one of the said games, or by betting on the players, are declared void, and the winner shall forfeit treble the value of the money or other thing won, above 100*l.*

The construction which has been put on this section, may be gathered from the following case:

In debt for 100*l.* the plaintiff declared upon articles^a of agreement, purporting that the plaintiff and defendant should run a horse for 100*l.*, and if the defendant lost, that he should pay the 100*l.*, &c. The defendant pleaded the third section of stat. 16 Car. 2. Holt, for the plaintiff, insisted, that the statute intended to avoid securities given for money lost at play, but not where the contract was precedent; but the court were of a different opinion; that such construction

^a *Roebuck and another v. Hamerton*, ^b *Hedgeborrow v. Rosenden*, 1 Vent. 253.
Cowp. 737.

would wholly elude the statute, and let men loose to play for any great sum, provided they secured it beforehand, and added, that this statute being to suppress the practice of excessive gaming^l should be construed in the most extensive manner that could be to answer that end.

A. lost at play to the plaintiff^k, and gave him a bill for the amount of the sum lost, on the defendant, who accepted the bill, and afterwards refused payment; to an action brought on the bill, the defendant pleaded, that after the 29th day of September, 1664^l, and before the making the said bill, A. and the plaintiff were playing together at hazard, and that A. then, at one time and meeting, lost to the plaintiff above 100*l*. and that for securing the payment thereof, A. drew the bill in question on the defendant, who accepted the same, and that by force of the statute^m, that acceptance was void in law. On demurrer to this plea, it was insisted, in support of the demurrer, that this case was not within the statute; because the nature of the duty was altered, and a new contract created by the acceptance, which was the ground of the action. But the court overruled the objection; for although this was a kind of new contract, yet all was founded on the illegal and tortious winning, and it only secured the payment of that money, and, therefore, it was within the statute, the plaintiff being privy to the first wrong. Another objection was madeⁿ, that if this case should be taken to be within the statute, it would very much endanger the credit of English bills of exchange, if they might be defeated by such collateral matter; for it would be injurious to the public trade of England, both foreign and domestic. To this it was answered by the court, that as to the inconvenience concerning trade, there could not be any in this particular case, because the bill had gone no farther than to the first hands, viz. to the hands of the plaintiff, who won the money, and so no damage could accrue to any person but to him, who was certainly a person within the statute.

By 9 Ann, c. 14. s. 1. "All notes, bills, bonds, judgments, mortgages, or other securities, given by any person where the whole or any part of the consideration of such securities shall be for money, or other valuable thing, won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game, or by betting on the sides of such as game at

i. 2 Lev. 94.

k Hussey v. Jacob, Salk. 344. Carth.

l 356. and see the pleadings, 5 Mod. 176.

l The day from which the 16 Car. 2. c. 7. s. 3. was to take effect.

m 16 Car. 2. c. 7. s. 3.

n Carth. 357.

any of the aforesaid games, or for repaying any money knowingly lent for such gaming or betting, or lent at the time and place of such play, to any person that shall play or bet, shall be void."

It appears from the cases of *Goodburn v. Marley*, Str. 1159; *Blaxton v. Pye*, 2 Wils. 309. and *Clayton v. Jennings*, 2 Bl. R. 706. that wagers on horse-races are within the statutes 16 Car. 2. c. 7. and 9 Ann. c. 14.; and, consequently, actions founded on such wagers cannot be supported. In the case of *Blaxton v. Pye*, the court said, that though horse racing was not mentioned in the statute 9 Ann., yet it was within the words "other game" (2). So in *Lynall v. Longbotham*, 2 Wils. 36. the court of C. B. were of opinion, that a foot race was within the 9 Ann., for foot race was mentioned in the 16 Car. to which the 9 Ann. must relate. And this opinion was recognised and adopted by the court in *Brown v. Berkeley*, Cowp. 281.

It is clear, that if these statutes had not been affected by any subsequent provisions of the legislature, every species of wagers at horse races would have been illegal; but now, by stat. 13 Geo. 2. c. 19. *matches* (3) for 50*l.* (4) and upwards, are legalized, provided they are run at certain places, and the horses carry certain weights; and by the stat. 18 Geo. 2. c. 34. s. 11. the restrictions as to running at particular places, and within certain weights, are taken away (5).

(2) In *Jeffreys v. Walter*, 1 Wils. 320. the court inclined to think, that cricket was a game within the meaning of the stat. 9 Ann.

(3) In *Connor v. Quick*, cited by Aston J. in 2 Bl. R. 708. the court took a distinction between running a horse for 50*l.* which was lawful, and betting on the side of a horse, which was not so; but if neither of the sums betted by the parties amount to 10*l.*, such bet is legal, not being contrary to 9 Ann. c. 14. *M'Allester v. Haden*, 2 Camp. N. P. C. 438.

(4) It was agreed between plaintiff and defendant, that each should start his mare, and that if either should refuse, he should forfeit 25*l.* to the other, but the plaintiff was to pay the defendant 5*l.* beforehand, as a consideration to induce him to make the match. The defendant afterwards refusing to run the match, the plaintiff brought an action against him for the 25*l.* *Perrot, Baron*, before whom the cause was tried, considered this as a match for 50*l.* and on a motion in arrest of judgment, the court of K. B. were of the same opinion. *Bidmead v. Gale*, 4 Burr. 2432. 1 Bl. R. 671. S. C.

(5) "There seems to be much ground for arguing, from the

But horse races for a less sum than 50*l.* are expressly prohibited by the second section of 13 Geo. 2.; and, consequently, wagers on such horse races are illegal^a.

These statutes, viz. 13 and 18 Geo. 2., are confined to *bonâ fide* horse racing only; for in *Ximenes v. Jaques*, 6 T. R. 499., where the plaintiff obtained a verdict on a wager for 100 guineas, that he could perform a certain journey, in a post chaise and pair, within a given time, the court arrested the judgment (6).

So where A. betted with B. "500 guineas and a dinner," that A.'s horse should go from London to Sittingbourne^b sooner than B.'s two horses should go the same distance, B.'s horses to be placed at any distance from each other that B. should think proper; the wager having been won by B. and an action brought to recover the amount of the wager, and verdict for plaintiff, the court arrested the judgment, on the ground that the subject of the wager was not that species of horse race or match which was legalized by stat. 13 & 18 Geo. 2.

2. An action cannot be maintained upon such wagers as in the event may have an influence on the public policy of the kingdom.

On this principle it was holden^c, that a wager between two electors, on the event of the election of members to serve in parliament, was void; because it raised an improper bias in the minds of the parties to vote for one or other of

^a *Johnson v. Bann*, 4 T. R. 1. ^b *Whaley v. Pajot*, 2 Bos. & Pul. 51.
^c *Allen v. Hearn*, 1 T. R. 56.

nature of 16 Car. 2. and 9 Ann., that these statutes ought to be construed strictly, in order to enforce the principle on which they are founded, viz. to prohibit all horse racing, and that the 13 & 18 Geo. 2. are from their nature to be so construed as to encourage the breed of horses, and to permit that species of horse racing only called running on the turf. It is to be observed, that stat. 13 Geo. 2. speaks of entering, placing, starting, &c. and that the expression, "any place or places whatsoever," used in 18 G. 2. can hardly mean "all England." Per Lord Eldon C. J. in *Whaley v. Pajot*, 2 Bos. & Pul. 54.

(6) The reason of this decision is not stated in the report of the case; but in *Whaley v. Pajot*, 2 Bos. & Pul. 54. Lord Eldon C. J. said "upon inquiry of the judges of the Court of King's Bench, we find, that the judgment of the court in *Ximenes v. Jaques* proceeded on an opinion, that the stat. 13 & 18 Geo. 2. related to *bonâ fide* horse racing only."

the candidates, which bias would be subversive of the freedom of elections, and detrimental to the constitution.

Every contract in restraint of marriage is illegal, as being against the sound policy of the law. Hence a wager, that the plaintiff would not marry within six years, was holden to be void^r; for although the restraint was partial, yet the immediate tendency of such contract, as far as it went, was to discourage marriage, and no circumstances appeared to shew that the restraint, in the particular instance, was prudent and proper.

Any wager which leads to a public inquiry into the mode of playing an illegal game^s, *e. g.* hazard, by which the bystanders may acquire a knowledge of it, is contrary to good morals and the policy of the law, and, therefore, not a ground on which an action can be maintained.

In like manner, the court will not entertain an action on a wager upon an abstract question of law or judicial practice, not arising out of pre-existing circumstances, in which the parties have an interest^t. An action cannot be maintained upon a wager on a cock-fight^u, because it is a barbarous diversion, which ought not to be encouraged or sanctioned in a court of justice; and further because it would tend to the degradation of the court to entertain such inquiries.

3. So if the subject of the wager lead to improper inquiries, which respect the interest and general importance of the country, they are illegal, as being contrary to sound policy; as wagers on the amount of the hop duties^x, or the receipt tax, or any other branch of the public revenue. And this rule holds, although the actual discussion may be excluded by the special circumstances of the case: as where the wager being on the amount of the hop duties, the defendant had admitted that he had lost his wager^y; so where defendant had given a promissory note for the amount of the wager^z.

4. Where the discussion of the subject of the wager will be attended with injury to a third person, and lead to indecent evidence.

On this principle^a, a wager between two indifferent par-

^r *Bartley v. Rice*, 10 East, 22.

^s *Brown v. Leeson*, 2 H. Bl. 43.

^t *Henkin v. Guerin*, 12 East, 247.

^u *Squires v. Whiskeyn*, 3 Camp. N. P. C.

140. *Ld. Ellenborough C. J.*

^x *Atherfold v. Beard*, 2 T. R. 610.

^y *Atherfold v. Beard*, 2 T. R. 610.

^z *Shirley v. Sankey*, 2 Bos. & Pul. 130.

^a *Dacosta v. Jones*, Cowp. 729.

sons on the sex of the Chevalier D'Eon, who had appeared to the world as a man, and acted in that character in a variety of capacities, was holden illegal (6).

(6) The Chevalier D'Eon was for many years asserted and implicitly believed to the last to be a female, of which sex the Chevalier latterly wore the attire. This curious question, however, was finally set at rest on the death of the Chevalier in May 1810, when the body was dissected in the presence of several professional gentlemen, and it was certified, by an eminent surgeon, that the male organs were in every respect perfectly formed.

APPENDIX.

No. I.

§ 1.—*Notice of Motion to put off a Trial for the Absence of a Witness.*

In the King's Bench.

A. B. plaintiff,
and
C. D. defendant.

Take notice, that this honourable court will be moved on, &c. or so soon after as counsel can be heard, that the trial of this cause may be put off until next ——— term, on account of the absence of a material witness on the part of the defendant, and in the mean time all further proceedings be stayed.

Your's, &c.
G. H. defendant's attorney.

To Mr. E. F. plaintiff's
attorney.

§ 2.—*Affidavit in Support of Motion to put off Trial for the Absence of a Witness.*

In the King's Bench

A. B. plaintiff,
and
C. D. defendant.

C. D. of, &c. the defendant in this cause, maketh oath and saith, that issue was joined in this cause in ——— term last past, and that notice was given for the trial thereof at the ——— sitting within (or at the sittings after) the said term: And this deponent further saith, that E. F. late of, &c. is a material witness for him this deponent in the said cause, as he is advised and believes, and that he cannot safely proceed to the trial thereof without the testimony of him the said E. F. And this deponent further saith, that in consequence of the notice of trial so given as aforesaid, he this deponent caused inquiry to be made, &c. (stating the nature and result of the inquiry made after the witness, and the time when he is likely to attend).

No. II.

*Demurrer to Evidence and Joinder.**

"Afterwards on the day, and at the place within contained, before Sir G. W. knight, one of the barons of our lord the king, of

* For form of plea puis darrein continuance, see ante p. 123.

his Court of Exchequer at Westminster, Sir J. B. knight, one of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, and others their fellows, justices of our said lord the king, assigned to take the assizes in and for the city of W— in the county of the same city, according to the form of the statute, &c. come as well the within-named A. B. esq. as the within-named C. D. esq. by their attorney within-named. And the jurors of the jury, whereof mention is within made; that is to say R. L. &c. being called likewise come, and being chosen, tried, and sworn to say the truth of the premises within contained; as to the first issue between the parties within joined, say, that the said C. D. is guilty of the trespass within complained of, in manner and form as the said A. B. hath above complained; and they assess the damages of the said A. B. by reason thereof to sixpence. And as to the issue lastly within joined between the said parties, the said C. D. shews in evidence to the jury aforesaid, to prove and maintain the issue lastly within joined on his part by one witness, That" (so state the evidence) "And the said A. B. says, that the aforesaid matter to the jurors aforesaid, in form aforesaid shewn in evidence by the said C. D. is not sufficient in law to maintain the said issue lastly within joined, on the part of the said C. D., and that he the said A. B., to the matter aforesaid, in form aforesaid shewn in evidence, hath no necessity, nor is he obliged by the laws of the land to answer; and this he is ready to verify: Wherefore for want of sufficient matter in that behalf shewn in evidence to the jury aforesaid, the said A. B. prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue; and that his damages by reason of the trespass within complained of, may be adjudged to him, &c." "And the said C. D., for that he hath shewn in evidence to the jury aforesaid, sufficient matter to maintain the issue lastly within joined, on the part of the said C. D., and which he is ready to verify; and for as much as the said A. B. doth not deny, nor in any manner answer the said matter, prays judgment; and that the said A. B. may be barred from having his aforesaid action against him, and that the jury aforesaid may be discharged from giving their verdict upon the issue lastly joined, &c. Wherefore let the jury aforesaid be discharged by the court here, by the assent of the parties, from giving any verdict thereupon."

No. III.

Bill of Exception.

"Be it remembered, that in the term of the Holy Trinity, in the — year of the reign of our sovereign lord George the 3d. now king of Great Britain, and so forth, came A. B. by ——— his attorney, into the court of our said lord the king of the Bench at Westminster, and impleaded C. D. E. F. and G. H. in a certain plea of trespass, on which the said A. B. declared against them, That" (set out the

* Joinder.

declaration and other pleadings,) "And thereupon the issue was joined between the said A. B. and the said C. D. E. F. and G. H.; and afterwards, to wit, at the sittings of Nisi Prius held at the Guildhall of the city of London aforesaid, in and for the said city, before the right honourable E. Ld. E. Chief Justice of our said lord the king of the Bench at Westminster, T. S. esq. being associated to the said chief justice, according to the form of the statute in such case made and provided; on — the — day of —, in the year of the reign of our said lord the present king, the aforesaid issue so joined between the said parties as aforesaid, came to be tried by a jury of the city of London aforesaid, for that purpose duly empannelled, that is to say, I. K. and L. M. &c. good and lawful men of the said city of London; at which day came there as well the said A. B. as also the said C. D. E. F. and G. H., by their respective attornies aforesaid. And the jurors of the jury aforesaid empannelled to try the said issue being called, also came, and were then and there in due manner chosen and sworn to try the same issue; and upon the trial of that issue the counsel learned in the law for the said A. B. to maintain and prove the said issue, on his part gave in evidence, That" (So set out the evidence on the part of the plaintiff, and then set out the evidence on the part of the defendants, and then proceed as follows) "Whereupon the said counsel for the said defendants did then and there insist before the chief justice aforesaid, on the behalf of the defendants above-named, that the said several matters so produced and given in evidence on the part of the said defendants as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, to entitle the said defendants to the benefit of the statute made in the 24th year of the reign of his late majesty King George the second, entitled, an act for rendering justices of the peace more safe in the executions of their office, and for indemnifying constables and others, acting in obedience to their warrants; and that therefore the said A. B. ought to be barred of his aforesaid action, and the said defendants acquitted thereof, and thereupon the said defendants, by their counsel aforesaid, did then and there pray of the said justice to admit and allow the said matters and proof so produced and given in evidence for the said defendants aforesaid, to be conclusive evidence to entitle the said defendants to the benefit of the statute aforesaid, and to bar the said A. B. of his action aforesaid. But to this, the counsel learned in the law, on behalf of the said A. B., did then and there insist before the chief justice aforesaid, that the matters and evidence aforesaid, so produced and proved on the part of the said defendants as aforesaid, were not sufficient, nor ought to be admitted or allowed to entitle the said defendants to the benefit of the statute aforesaid; or to bar the said A. B. of his aforesaid action, and that neither the said defendants, or any of them, nor the said Earl of H., were or was within the words or meaning of the statute made in the seventh year of the reign of his late majesty King James the first, entitled, an act for ease in pleading against troublesome and contentious suits, prosecuted against justices of peace, mayors, constables, and certain other his majesty's officers, for the lawful

execution of their office, nor of the statute made in the 21st year of the reign of the same late king, entitled, an act to enlarge and make perpetual the act made for ease in pleading against troublesome and contentious suits prosecuted against justices of the peace, mayors, constables, and certain other his majesty's officers, for the lawful execution of their office, made in the seventh year of his majesty's most happy reign; nor of the said statute made in the 24th year of the reign of his late majesty King George the second; nor in any way entitled to the benefit of any of these statutes: And the counsel for the said A. B. further insisted, that the seizure and imprisonment of the said A. B. were not made or done in obedience to the said warrant, nor have the said defendants, or any of them in that behalf, any authority thereby. And the said chief justice did then and there declare and deliver his opinion to the jury aforesaid; that the said several matters so produced and proved on the part of the defendants were not upon the whole case sufficient to bar the said A. B. of his aforesaid action against them, and with that direction left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said A. B., and 300l. damages; whereupon the said counsel for the said defendants did then and there on the behalf of the said defendants, except to the aforesaid opinion of the said chief justice, and insisted on the said several matters and proofs as an absolute bar to the aforesaid action, by virtue of the last mentioned statute: And in as much as the said several matters so produced and given in evidence, on the part of the said defendants, and by their counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the aforesaid defendants did then and there propose their aforesaid exception to the opinion of the said chief justice, and request the said chief justice to put his seal to this bill of exception, containing the said several matters so produced and given in evidence on the part of the said defendants as aforesaid, according to the form of the statute in such case made and provided; and thereupon the aforesaid chief justice, at the request of the said counsel for the above-named defendants, did put his seal to this bill of exception, pursuant to the aforesaid statute in such case made and provided, on the ——— day of ——— aforesaid, in the ——— year of the reign of his said present majesty."

The above precedent is taken from a bill of exception, which was made use of in the year 1763: but it does not seem necessary to state the whole record in the bill*, provided the bill be tacked to the record; which the statute plainly shews may be done, by saying, *If the exceptions be not in the roll*: and there are precedents to warrant this mode of proceeding.

* Ball. N. P. 319.

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